The Marine Mammal Protection Act of 1972 As Amended

March 1993

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Compiled and annotated by the

Marine Mammal Commission
1825 Connecticut Avenue, N.W.
Washington, D.C. 20009

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The Marine Mammal Protection Act of 1972 as Amended[1]

To protect marine mammals; to establish a Marine Mammal Commission; for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, with the following table of contents, may be cited as the "Marine Mammal Protection Act of 1972".

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This copy of the Marine Mammal Protection Act is provided for information only. Before relying on any portion of the Act as it appears here, reference should be made to the official report of the Act in the United States Code.

Please note that Public Law 102-523 and Public Law 102-587 each added a new Title III to the Marine Mammal Protection Act. Pending further legislation, the Act will contain two titles designated as Title III, each with different provisions designated as sections 301 through 308. The first Title III has been codified at 16 U.S.C. 1411-1418. The second Title III has been codified at 16 U.S.C. 1421-1421h. To minimize confusion, all references to Title III or to sections 301-308 are followed in the text by the appropriate United States Code citation.

Please note further that, as amended in 1992, the Act contains two different definitions of the term "intermediary nation" (section 3(5) and section 3(17)) and two different definitions (for the terms "waters under the jurisdiction of the United States" and "fishery") designated as section 3(15).

Findings and Declaration of Policy

16 U.S.C. 1361

Sec. 2. The Congress finds that—

(1) certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions;

(3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;

(4) negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals;

(5) marine mammals and marine mammal products either—

(A) move in interstate commerce, or

(B) affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce,

and that the protection and conservation of marine mammals is therefore necessary to insure the continuing availability of those products which move in interstate commerce; and

(6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.[4]

Definitions

16 U.S.C. 1362

Sec. 3. For the purposes of this Act—

(1) The term "depletion" or "depleted" means any case in which—

(A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under title II of this Act, determines that a species or population stock is below its optimum sustainable population;

(B) a State, to which authority for the conservation and management of a species or population stock is transferred under section 109, determines that such species or stock is below its optimum sustainable population; or

(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973.[5]

(2) The terms "conservation" and "management" mean the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population.[6] Such terms include the entire scope of activities that constitute a modern scientific resource program, including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within these terms, when and where appropriate, is the periodic or total protection of species or populations as well as regulated taking.

(3) The term "district court of the United States" includes the District Court of Guam, District Court of the Virgin Islands, District Court of Puerto Rico, District Court of the Canal Zone, and, in the case of American Samoa and the Trust Territory of the Pacific Islands, the District Court of the United States for the District of Hawaii.

(4) The term "humane" in the context of the taking of a marine mammal means that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.

(5) The term "intermediary nation" means a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to section 101(a)(2)(B).[7]

(6) The term "marine mammal" means any mammal which (A) is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea), or (B) primarily inhabits the marine environment (such as the polar bear); and, for the purposes of this Act, includes any part of any such marine mammal, including its raw, dressed, or dyed fur or skin.

(7) The term "marine mammal product" means any item of merchandise which consists, or is composed in whole or in part, of any marine mammal.

(8) The term "moratorium" means a complete cessation of the taking of marine mammals and a complete ban on the importation into the United States of marine mammals and marine mammal products, except as provided in this Act.

(9) The term "optimum sustainable population" means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.[8]

(10) The term "person" includes (A) any private person or entity, and (B) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

(11) The term "population stock" or "stock" means a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature.

(12)(A) Except as provided in subparagraph (B), the term "Secretary" means—

(i) The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating, as to all responsibility, authority, funding, and duties under this Act with respect to members of the order Cetacea and members, other than walruses, of the order Pinnipedia, and

(ii) The Secretary of the Interior as to all responsibility, authority, funding, and duties under this Act with respect to all other marine mammals covered by this Act.

(B) in title III [16 U.S.C. 1421 *et seq.*] the term "Secretary" means the Secretary of Commerce.[9]

(13) The term "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

(14) The term "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, American Samoa, Guam, and Northern Mariana Islands.[10]

(15) The term "waters under the jurisdiction of the United States" means—

(A) the territorial sea of the United States;

(B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured; and

(C) the areas referred to as eastern special areas in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990; in particular, those areas east of the maritime boundary, as defined in that Agreement, that lie within 200

nautical miles of the baselines from which the breadth of the territorial sea of Russia is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the United States is measured.[11]

(15) The term "fishery" means—

(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and

(B) any fishing for such stocks.[12]

(16) The term "competent regional organization"—

(A) for the tuna fishery in the eastern tropical Pacific Ocean, means the Inter-American Tropical Tuna Commission; and

(B) in any other case, means an organization consisting of those nations participating in a tuna fishery, the purpose of which is the conservation and management of that fishery and the management of issues relating to that fishery.

(17) The term "intermediary nation" means a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to section 101(a)(2)(B). If such nation certifies and provides reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States pursuant to this section, the Secretary shall, as soon as practicable after receiving complete information regarding certification and proof, make an affirmative finding that such nation does not constitute an intermediary nation for purposes of this section.

Effective Date

Sec. 4. The provisions of this Act shall take effect upon the expiration of the sixty--day period following the date of its enactment.

Title I—Conservation and Protection of Marine Mammals

Moratorium and Exceptions

16 U.S.C. 1371

Sec. 101. (a) There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this Act, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

(1) Consistent with the provisions of section 104, permits may be issued by the Secretary for taking and importation for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock if—[13]

(A) the taking proposed in the application for any such permit, or

(B) the importation proposed to be made, is first reviewed by the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under title II of this Act. The Commission and Committee shall recommend any proposed taking or importation which is consistent with the purposes and policies of section 2 of this Act. The Secretary shall, if he grants approval for importation, issue to the importer concerned a certificate to that effect which shall be in such form as the Secretary of the Treasury prescribes and such importation may be made upon presentation of the certificate to the customs officer concerned.

(2) Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 104 subject to regulations prescribed by the Secretary in accordance with section 103. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.[14] The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary—

(A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States;

(B) in the case of yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States,

shall require that the government of the exporting nation provide documentary evidence that—

(i) the government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to that of the United States; and

(ii) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of marine mammals by United States vessels in the course of such harvesting,[15]

except that the Secretary shall not find that the regulatory program, or the average rate of incidental taking by vessels, of a harvesting nation is comparable to that of the United States for purposes of clause (i) or (ii) of this paragraph unless—

(I) the regulatory program of the harvesting nation includes, by no later than the beginning of the 1990 fishing season, such prohibitions against encircling pure schools of species of marine mammals, conducting sundown sets, and other activities as are made applicable to United States vessels;

(II) the average rate of the incidental taking by vessels of the harvesting nation is no more than 2.0 times that of United States vessels during the same period by the end of the 1989 fishing season and no more than 1.25 times that of United States vessels during the same period by the end of the 1990 fishing season and thereafter;

(III) the total number of eastern spinner dolphin (Stenella longirostris) incidentally taken by vessels of the harvesting nation during the 1989 and subsequent fishing seasons does not exceed 15 percent of the total number of all marine mammals incidentally taken by such vessels in such year and the total number of coastal spotted dolphin (Stenella attenuata) incidentally taken by such vessels in such seasons does not exceed 2 percent of the total number of all marine mammals incidentally taken by such vessels in such year;

(IV) the rate of incidental taking of marine mammals by the vessels of the harvesting nation during the 1989 and subsequent fishing seasons is monitored by the porpoise mortality observer program of the InterAmerican Tropical Tuna Commission or an equivalent international program in which the United States participates and is based upon observer coverage that is equal to that achieved for United States vessels during the same period, except that the Secretary may approve an alternative observer program if the Secretary determines, no less than sixty days after publication in the Federal Register of the Secretary's proposal and reasons therefor, that such an alternative observer program will provide sufficiently reliable documentary evidence of the average rate of incidental taking by a harvesting nation; and

(V) the harvesting nation complies with all reasonable requests by the Secretary for cooperation in carrying out the scientific research program required by section 104(h)(3) of this title;[16]

(C) shall require the government of any intermediary nation to certify and provide reasonable proof to the Secretary that it has not imported, within the preceding six months, any yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation to the United States under subparagraph (B);

(D) shall, six months after importation of yellowfin tuna or tuna products has been banned under this section, certify such fact to the President, which certification shall be deemed to be a certification for the purposes of section 8(a) of the Fishermen's Protective Act of 1967 (22 U.S.C. 1978(a)) for as long as such ban is in effect;[17] and

(E)(i) except as provided in clause (ii), in the case of fish or products containing fish harvested by a nation whose fishing vessels engage in high seas driftnet fishing, shall require that the government of the exporting nation provide documentary evidence that the fish or fish product was not harvested with a large-scale driftnet in the South Pacific Ocean after July 1, 1991, or in any other water of the high seas after January 1, 1993, and

(ii) in the case of tuna or a product containing tuna harvested by a nation whose fishing vessels engage in high seas driftnet fishing, shall require that the government of the exporting nation provide documentary evidence that the tuna or tuna product was not harvested with a large-scale driftnet anywhere on the high seas after July 1, 1991.

For purposes of subparagraph (E), the term "driftnet" has the meaning given such term in section 4003 of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (16 U.S.C. 1822 note), except that, until January 1, 1994, the term "driftnet" does not include the use in the northeast Atlantic Ocean of gillnets with a total length not to exceed five kilometers if the use is in accordance with regulations adopted by the European Community pursuant to the October 28, 1991, decision by the Council of Fisheries Ministers of the Community.[18]

(3)(A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this Act to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 102, 103, 104, and 111 of this title permitting and governing such taking and importing, in accordance with such determinations: *Provided, however*, That the Secretary, in making such determinations, must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this Act: *Provided further, however*, That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this Act. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation.

(B) Except for scientific research purposes or enhancing the survival or recovery of a species or stock as provided for in paragraph (1) of this subsection,

during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal.[19]

(4)(A) During any period of five consecutive years, the Secretary shall allow the incidental, but not the intentional, taking, by citizens of the United States while engaging in commercial fishing operations, of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice and opportunity for public comment—

(i) finds that the total of such taking during such five-year period will have a negligible impact on such species or stock; and

(ii) provides guidelines pertaining to the establishment of a cooperative system among the fishermen involved for the monitoring of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain, the permission to take marine mammals under subparagraph (A) if the Secretary finds, after notice and opportunity for public comment, that—

(i) the taking allowed under subparagraph (A) is having more than a negligible impact on the species or stock concerned; or

(ii) the policies, purposes and goals of this Act would be better served through the application of this title without regard to this subsection.

Sections 103 and 104 shall not apply to the taking of marine mammals under the authority of this paragraph.

(5)(A) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment—

(i) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) or section 109(f) or, in the case of a cooperative agreement under both this Act and the Whaling Convention Act of 1949, pursuant to section 112(c); and

(ii) prescribes regulations setting forth—

(I) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses; and

(II) requirements pertaining to the monitoring and reporting of such taking.[20]

(B) The Secretary shall withdraw, or suspend for a time certain (either on an individual or class basis, as appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity within a specified geographical region if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless subparagraph (C)(i) applies), that—

(i) the regulations prescribed under subparagraph (A) regarding methods of taking, monitoring, or reporting are not being substantially complied with by a person engaging in such activity; or

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.

(C)(i) The requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.

(ii) Sections 103 and 104 shall not apply to the taking of marine mammals under the authority of this paragraph.[21]

(b) Except as provided in section 109, the provisions of this Act shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—

(1) is for subsistence purposes; or[22]

(2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: *Provided*, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: *And provided further*, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of panto-graphs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting; and

(3) in each case, is not accomplished in a wasteful manner.

Notwithstanding the preceding provisions of this subsection, when, under this Act, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other

factors related to the reason for establishing such regulations and consistent with the purposes of this Act. Such regulations shall be prescribed after notice and hearing required by section 103 of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared.

(c) In order to minimize undue economic hardship to persons subject to this Act, other than those engaged in commercial fishing operations referred to in subsection (a)(2) of this section, the Secretary, upon any such person filing an application with him and upon filing such information as the Secretary may require showing, to his satisfaction, such hardship, may exempt such person or class of persons from provisions of this Act for no more than one year from the date of the enactment of this Act, as he determines to be appropriate.

Prohibitions

16 U.S.C. 1372

Sec. 102. (a) Except as provided in sections 101, 103, 104, 109, 111, 113, and 114 of this title or title III [16 U.S.C. 1421 *et seq.*], it is unlawful—[23]

(1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas;

(2) except as expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before the effective date of this title or by any statute implementing any such treaty, convention, or agreement—

(A) for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States; or

(B) for any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose in any way connected with the taking or importation of marine mammals or marine mammal products; and

(3) for any person, with respect to any marine mammal taken in violation of this title, to possess that mammal or any product from that mammal;

(4) for any person to transport, purchase, sell, or offer to purchase or sell any marine mammal or marine mammal product; and

(5) for any person to use, in a commercial fishery, any means or methods of fishing in contravention of any regulations or limitations, issued by the Secretary for that fishery to achieve the purposes of this Act.[24]

(b) Except pursuant to a permit for scientific research, or for enhancing the survival or recovery of a species or stock, issued under section 104(c) of this title, it is unlawful to import into the United States any marine mammal if such mammal was—

(1) pregnant at the time of taking;

(2) nursing at the time of taking, or less than eight months old, whichever occurs later;

(3) taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock; or[25]

(4) taken in a manner deemed inhumane by the Secretary.

Notwithstanding the provisions of paragraphs (1) and (2), the Secretary may issue a permit for the importation of a marine mammal, if the Secretary determines that such importation is necessary for the protection or welfare of the animal.[26]

(c) It is unlawful to import into the United States any of the following:

(1) Any marine mammal which was—

(A) taken in violation of this title; or

(B) taken in another country in violation of the law of that country.

(2) Any marine mammal product if—

(A) the importation into the United States of the marine mammal from which such product is made is unlawful under paragraph (1) of this subsection; or

(B) the sale in commerce of such product in the country of origin of the product is illegal;

(3) Any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident[27] to the catching of the fish.

(d) Subsections (b) and (c) of this section shall not apply—

(1) in the case of marine mammals or marine mammal products, as the case may be, to which subsection (b)(3) of this section applies, to such items imported into the United States before the date on which the Secretary publishes notice in the Federal Register of his proposed rulemaking with respect to the designation of the species or stock concerned as depleted; or[28]

(2) in the case of marine mammals or marine mammal products to which subsection (c)(1)(B) or (c)(2)(B) of this section applies, to articles imported into the United States before the effective date of the foreign law making the taking or sale, as the case may be, of such marine mammals or marine mammal products unlawful.

(e) This Act shall not apply with respect to any marine mammal taken before the effective date of this Act, or to any marine mammal product consisting of, or composed in whole or in part of, any marine mammal taken before such date.

(f) It is unlawful for any person or vessel or other conveyance to take any species of whale incident[29] to commercial whaling in waters subject to the jurisdiction of the United States.[30]

Regulations On Taking Of Marine Mammals

16 U.S.C. 1373

Sec. 103. (a) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 2 of this Act.

(b) In prescribing such regulations, the Secretary shall give full consideration to all factors which may affect the extent to which such animals may be taken or imported, including but not limited to the effect of such regulations on—

(1) existing and future levels of marine mammal species and population stocks;

(2) existing international treaty and agreement obligations of the United States;

(3) the marine ecosystem and related environmental considerations;

(4) the conservation, development, and utilization of fishery resources; and

(5) the economic and technological feasibility of implementation.

(c) The regulations prescribed under subsection (a) of this section for any species or population stock of marine mammal may include, but are not limited to, restrictions with respect to—

(1) the number of animals which may be taken or imported in any calendar year pursuant to permits issued under section 104 of this title;

(2) the age, size, or sex (or any combination of the foregoing) of animals which may be taken or imported, whether or not a quota prescribed under paragraph (1) of this subsection applies with respect to such animals;

(3) the season or other period of time within which animals may be taken or imported;

(4) the manner and locations in which animals may be taken or imported; and

(5) fishing techniques which have been found to cause undue fatalities to any species of marine mammal in a fishery.

(d) Regulations prescribed to carry out this section with respect to any species or stock of marine mammals must be made on the record after opportunity for an agency hearing on both the Secretary's determination to waive the moratorium pursuant to section 101(a)(3)(A) of this title and on such regulations, except that, in addition to any other requirements imposed by law with respect to agency rulemaking, the Secretary shall publish and make available to the public either before or concurrent with the publication of notice in the Federal Register of his intention to prescribe regulations under this section—

(1) a statement of the estimated existing levels of the species and population stocks of the marine mammal concerned;

(2) a statement of the expected impact of the proposed regulations on the optimum sustainable population of such species or population stock;

(3) a statement describing the evidence before the Secretary upon which he proposes to base such regulations; and

(4) any studies made by or for the Secretary or any recommendations made by or for the Secretary or the Marine Mammal Commission which relate to the establishment of such regulations.

(e) Any regulation prescribed pursuant to this section shall be periodically reviewed, and may be modified from time to time in such manner as the Secretary deems consistent with and necessary to carry out the purposes of this Act.

(f) Within six months after the effective date of this Act and every twelve months thereafter, the Secretary shall report to the public through publication in the Federal Register and to the Congress on the current status of all marine mammal species and population stocks subject to the provisions of this Act. His report shall describe those actions taken and those measures believed necessary, including where appropriate, the issuance of permits pursuant to this title to assure the well-being of such marine mammals.

Permits

16 U.S.C. 1374

Sec. 104. (a) The Secretary may issue permits which authorize the taking or importation of any marine mammal.

(b) Any permit issued under this section shall—

(1) be consistent with any applicable regulation established by the Secretary under section 103 of this title, and

(2) specify—

(A) the number and kind of animals which are authorized to be taken or imported,

(B) the location and manner (which manner must be determined by the Secretary to be humane) in which they may be taken, or from which they may be imported,

(C) the period during which the permit is valid, and

(D) any other terms or conditions which the Secretary deems appropriate.

In any case in which an application for a permit cites as a reason for the proposed taking the overpopulation of a particular species or population stock, the Secretary shall first consider whether or not it would be more desirable to transplant a number of animals (but not to exceed the number requested for taking in the application) of that species or stock to a location not then inhabited by such species or stock but previously inhabited by such species or stock.

(c)(1) Any permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock shall specify, in addition to the conditions required by subsection (b) of this section, the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation. Any person authorized to take or import a marine mammal for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority.

(2) A permit may be issued for public display purposes only to an applicant which offers a program for education or conservation purposes that, based on professionally recognized standards of the public display community, is acceptable to the Secretary and which submits with the permit application information indicating that the applicant's facilities are open to the public on a regularly scheduled basis and that access to the facilities is not limited or restricted other than by charging of an admission fee.

(3) A permit may be issued for scientific research purposes only to an applicant which submits with its permit application information indicating that the taking is required to further a bona fide scientific purpose and does not involve unnecessary duplication of research. No permit issued for purposes of scientific research shall authorize the killing of a marine mammal unless the applicant demonstrates that a nonlethal method for carrying out the research is not feasible. The Secretary shall not issue a permit for research which involves the lethal taking of a marine mammal from a species or stock designated as depleted, unless the Secretary determines that the results of such research will directly benefit that species or stock, or that such research fulfills a critically important research need.

(4)(A) A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultation with the Marine Mammal Commission and after notice and opportunity for public comment, has first determined that—

(i) taking or importation is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock; and

(ii) taking or importation is consistent (I) with any conservation plan adopted by the Secretary under section 115(b) of this title or any recovery plan developed under section 4(f) of the Endangered Species Act of 1973 for the species or stock, or (II) if there is no conservation or recovery plan in place, with the Secretary's evaluation of actions required to enhance the survival or recovery of the species or stock in light to the factors that would be addressed in a conservation plan or a recovery plan.

(B) A permit issued in accordance with this paragraph may allow the captive maintenance of a marine mammal from a depleted species or stock only if the Secretary—

(i) determines that captive maintenance is likely to contribute to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves;

(ii) determines that the expected benefit to the affected species or stock outweighs the expected benefit of alternatives which do not require removal of animals from the wild; and

(iii) requires that the marine mammal or its progeny be returned to the natural habitat of the species or stock as soon as feasible, consistent with the objectives of any applicable conservation plan or recovery plan, or of any evaluation by the Secretary under subparagraph (A).

The Secretary may allow the public display of such a marine mammal only if the Secretary determines that such display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.[31]

(d)(1) The Secretary shall prescribe such procedures as are necessary to carry out this section, including the form and manner in which application for permits may be made.

(2) The Secretary shall publish notice in the Federal Register of each application made for a permit under this section. Such notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data or views, with respect to the taking or importation proposed in such application.

(3) The applicant for any permit under this section must demonstrate to the Secretary that the taking or importation of any marine mammal under such permit will be consistent with the purposes of this Act and the applicable regulations established under section 103 of this title.

(4) If within thirty days after the date of publication of notice pursuant to paragraph (2) of this subsection with respect to any application for a permit any interested party or parties request a hearing in connection therewith, the Secretary may, within sixty days following such date of publication, afford to such party or parties an opportunity for such a hearing.

(5) As soon as practicable (but not later than thirty days) after the close of the hearing or, if no hearing is held, after the last day on which data, or views, may be submitted pursuant to paragraph (2) of this subsection, the Secretary shall (A) issue a permit containing such terms and conditions as he deems appropriate, or (B) shall deny issuance of a permit. Notice of the decision of the Secretary to issue or to deny any permit under this paragraph must be published in the Federal Register within ten days after the date of issuance or denial.

(6) Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such a permit. Such review, which shall be pursuant to chapter 7 of Title 5, United States Code, may be initiated by filing a petition for review in the United States district court for the district wherein the applicant for a permit resides, or has his principal place of business, or in the United States District Court for the District of Columbia, within sixty days after the date on which such permit is issued or denied.

(e)(1) The Secretary may modify, suspend, or revoke in whole or part any permit issued by him under this section—

(A) in order to make any such permit consistent with any change made after the date of issuance of such permit with respect to any applicable regulation prescribed under section 103 of this title, or

(B) in any case in which a violation of the terms and conditions of the permit is found.

(2) Whenever the Secretary shall propose any modification, suspension, or revocation of a permit under this subsection, the permittee shall be afforded opportunity, after due notice, for a hearing by the Secretary with respect to such proposed modification, suspension, or revocation. Such proposed action by the Secretary shall not take effect until a decision is issued by him after such hearing. Any action taken by the Secretary after such a hearing is subject to judicial review on the same basis as is any action taken by him with respect to a permit application under paragraph (5) of subsection (d) of this section.

(3) Notice of the modification, suspension, or revocation of any permit by the Secretary shall be published in the Federal Register within ten days from the date of the Secretary's decision.

(f) Any permit issued under this section must be in the possession of the person to whom it is issued (or an agent of such person) during—

(1) the time of the authorized or taking importation[32];

(2) the period of any transit of such person or agent which is incident to such taking or importation; and

(3) any other time while any marine mammal taken or imported under such permit is in the possession of such person or agent.

A duplicate copy of the issued permit must be physically attached to the container, package, enclosure, or other means of containment, in which the marine mammal is placed for purposes of storage, transit, supervision, or care.

(g) The Secretary shall establish and charge a reasonable fee for permits issued under this section.

(h)(1) Consistent with the regulations prescribed pursuant to section 103 of this title and to the requirements of section 101 of this title, the Secretary may issue general permits for the taking of such marine mammals, together with regulations to cover the use of such general permits.

(2)(A) Subject to subparagraph (B), the general permit issued under paragraph (1) on December 1, 1980 to the American Tunaboat Association is extended to authorize and govern the taking of marine mammals incidental to commercial purse seine fishing for yellowfin tuna during each year after December 31, 1984.

(B) The extension granted under subparagraph (A) is subject to the following conditions:

(i) The extension shall cease to have force and effect at the time the general permit is surrendered or terminated.

(ii) The permittee and certificate holders shall use the best marine mammal safety techniques and equipment that are economically and technologically practicable.

(iii) During the period of the extension, the terms and conditions of the general permit that are in effect on the date of the enactment of this paragraph shall apply, except that—

(I) the Secretary may make such adjustments as may be appropriate to those terms and conditions that pertain to fishing gear and fishing practice requirements and to permit administration;

(II) any such term and condition may be amended or terminated if the amendment or termination is based on the best scientific information available, including that obtained under the monitoring program required under paragraph (3)(A); and

(III) during each year of the extension, not to exceed 250 coastal spotted dolphin (Stenella attenuata) and not to exceed 2,750 eastern spinner dolphin (Stenella longirostris) may be incidentally taken under the general permit, and no accidental taking of either species is authorized at any time when incidental taking of that species is permitted.

(iv) The Secretary shall, by January 1, 1989, prescribe regulations to ensure that the backdown procedure during sets of the purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than thirty minutes after sundown. The Secretary may waive or otherwise modify such regulations for—

(I) a designated certificate holder on an observed trip if the Secretary determines, based on observer reports, that such restriction is not necessary because the certificate holder has consistently utilized fishing techniques and equipment so as to result in an incidental marine mammal mortality rate during sundown sets that is no higher than the average such rate for the fleet during daylight sets; or

(II) all certificate holders on observed trips if the Secretary determines that such restriction is not necessary because all certificate holders have developed and are utilizing fishing techniques and equipment that assure that the incidental marine mammal mortality rate during sundown sets will be no higher than such rate during daylight sets.

(v) The Secretary may authorize, after public notice and opportunity for comment, designated certificate holders to conduct experimental fishing operations on observed trips, under such terms and conditions as the Secretary may prescribe, for the purpose of testing proposed improvements in fishing techniques and equipment that may reduce the incidental mortality of marine mammals in the course of commercial yellowfin tuna fishing operations, and the Secretary may waive such terms and conditions of the general permit and this section, other than the quotas on incidental taking of marine mammals and the prohibition against encircling pure schools of certain species of marine mammals, as the Secretary determines to be necessary and appropriate for the conduct of such experimental fishing.

(vi) The Secretary, after public notice and opportunity for comment and consultation with the skippers' panel of experts established pursuant to the general permit, shall develop and implement by not later than the beginning of the 1990 fishing season a system of performance standards to maintain the diligence and proficiency of certificate holders in the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The system shall include such arrangements as are necessary for the identification of certificate holders whose incidental marine mammal mortality rate is consistently and substantially higher than the average rate of the fleet, and for the supplemental training and observation of such certificate holders, and provisions for suspension or revocation of certificates of inclusion of those certificate holders whose unacceptably high rate of incidental taking reflects a lack of diligence or proficiency in the use of the best marine mammal safety techniques and equipment.

(vii) It shall be unlawful to use any explosive devices other than class C explosive pest control devices in the course of commercial yellowfin tuna fishing subject to the general permit. The Secretary shall prescribe regulations, effective April 1, 1990, to prohibit or restrict the use of class C explosive pest control devices in the course of commercial yellowfin tuna fishing unless the Secretary determines, based on a study which the Secretary shall undertake, that the use of such devices does not result in physical impairment or increased mortality of marine mammals.

(viii) During the 1989 and subsequent fishing seasons, each certificated vessel shall carry on every fishing trip subject to this subsection an official observer certified by the Secretary or by the Inter-American Tropical Tuna

Commission for the purpose of conducting research and observing fishing operations unless, for reasons beyond the control of the Secretary, an observer is not available for such purpose. The Secretary may waive this requirement after the 1991 fishing season and establish a less extensive observer program if the Secretary, after notice and opportunity for comment, determines that such an alternative program will provide sufficiently reliable information.

(ix) The Secretary shall annually convene meetings with representatives of conservation and environmental organizations, the commercial tuna fishing industry, and other interested persons for the purpose of discussing the results of efforts to reduce the incidental mortality and serious injury of marine mammals under this subsection as well as throughout the international fleet as a whole and developing plans for such efforts during the next year. On or before April 1, 1992, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a comprehensive report on the results of such efforts. The report shall discuss the results of the scientific research programs, performance standards, observer program, prohibition on sundown sets, development of alternative fishing techniques, and other efforts required by this section, and shall include recommendations for such action as the Secretary considers necessary and desirable to reduce further the total mortality and serious injury of marine mammals in the course of commercial yellowfin tuna fishing throughout the international fleet.[33]

(C) The quota on the incidental taking of coastal spotted dolphin and eastern spinner dolphin under paragraph (2)(B)(iii)(III) shall be treated—

(i) as within, and not in addition to, the overall annual quota under the general permit on the incidental taking of marine mammals; and

(ii) for purposes of paragraph (2)(B)(iii)(II), as a term of the general permit in effect on the date of the enactment of this paragraph.

(3)(A) The Secretary shall, commencing on January 1, 1985, undertake a scientific research program to monitor for at least five consecutive years, and periodically as necessary thereafter, the indices of abundance and trends of marine mammal population stocks which are incidentally taken in the course of commercial purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean.

(B) If the Secretary determines, on the basis of the best scientific information available (including that obtained under the monitoring program), that the incidental taking of marine mammals permitted under the general permit referred to in paragraph (2) is having a significant adverse effect on a marine mammal population stock, the Secretary shall take such action as is necessary, after notice and an opportunity for an agency hearing on the record, to modify the applicable incidental take quotas or requirements for gear and fishing practices (or both such quotas and requirements) for such fishing so as to ensure that the marine mammal population stock is not significantly adversely affected by the incidental taking.

(C) For each year after 1984, the Secretary shall include in his annual report to the public and the Congress under section 103(f) a discussion of the proposed

activities to be conducted each year as part of the monitoring program required by subparagraph (A).

(D) There are authorized to be appropriated to the Department of Commerce for purposes of carrying out the monitoring program required under this paragraph not to exceed $4,000,000 for the period beginning October 1, 1984, and ending September 30, 1988.[34]

Penalties

16 U.S.C. 1375

Sec. 105. (a)(1) Any person who violates any provision of this title or of any permit or regulation issued thereunder may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking or importation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action.

(2) In any case involving an alleged unlawful importation of a marine mammal or marine mammal product, if such importation is made by an individual for his own personal or family use (which does not include importation as an accommodation to others or for sale or other commercial use), the Secretary may, in lieu of instituting a proceeding under paragraph (1), allow the individual to abandon the mammal or product, under procedures to be prescribed by the Secretary, to the enforcement officer at the port of entry.[35]

(b) Any person who knowingly violates any provision of this title or of any permit or regulation issued thereunder shall, upon conviction, be fined not more than $20,000 for each such violation, or imprisoned for not more than one year, or both.

Vessel Fine, Cargo Forfeiture, and Rewards

16 U.S.C. 1376

Sec. 106. (a) Any vessel or other conveyance subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall have its entire cargo or the monetary value thereof subject to seizure and forfeiture. All provisions of law relating to the seizure, judicial forfeiture, and condemnation of cargo for violation of the customs laws, the disposition of such cargo, and the proceeds from the sale thereof, and the remission or mitigation of any such forfeiture, shall apply with respect to the cargo of any vessel or other conveyance

seized in connection with the unlawful taking of a marine mammal insofar as such provisions of law are applicable and not inconsistent with the provisions of this title.

(b) Any vessel subject to the jurisdiction of the United States that is employed in any manner in the unlawful taking of any marine mammal shall be liable for a civil penalty of not more than $25,000. Such penalty shall be assessed by the district court of the United States having jurisdiction over the vessel. Clearance of a vessel against which a penalty has been assessed, from a port of the United States, may be withheld until such penalty is paid, or until a bond or otherwise satisfactory surety is posted. Such penalty shall constitute a maritime lien on such vessel which may be recovered by action in rem in the district court of the United States having jurisdiction over the vessel.

(c) Upon the recommendation of the Secretary, the Secretary of the Treasury is authorized to pay an amount equal to one-half of the fine incurred but not to exceed $2,500 to any person who furnishes information which leads to a conviction for a violation of this title. Any officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this section.

Enforcement

16 U.S.C. 1377

Sec. 107. (a) Except as otherwise provided in this title, the Secretary shall enforce the provisions of this title. The Secretary may utilize, by agreement, the personnel, services, and facilities of any other Federal agency for purposes of enforcing this title.

(b) The Secretary may also designate officers and employees of any State or of any possession of the United States to enforce the provisions of this title. When so designated, such officers and employees are authorized to function as Federal law enforcement agents for these purposes, but they shall not be held and considered as employees of the United States for the purposes of any laws administered by the Director of the Office of Personnel Management.[36]

(c) The judges of the district courts of the United States and the United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process, including warrants or other process issued in admiralty proceedings in United States district courts, as may be required for enforcement of this title and any regulations issued thereunder.

(d) Any person authorized by the Secretary to enforce this title may execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this title. Such person so authorized may, in addition to any other authority conferred by law—

(1) with or without warrant or other process, arrest any person committing in his presence or view a violation of this title or the regulations issued thereunder;

(2) with a warrant or other process, or without a warrant if he has reasonable cause to believe that a vessel or other conveyance subject to the jurisdiction of the United States or any person on board is in violation of any provision of this title or the regulations issued thereunder, search such vessel or conveyance and arrest such person;

(3) seize the cargo of any vessel or other conveyance subject to the jurisdiction of the United States used or employed contrary to the provisions of this title or the regulations issued hereunder or which reasonably appears to have been so used or employed; and

(4) seize, whenever and wherever found, all marine mammals and marine mammal products taken or retained in violation of this title or the regulations issued thereunder and shall dispose of them in accordance with regulations prescribed by the Secretary.

(e)(1) Whenever any cargo or marine mammal or marine mammal product is seized pursuant to this section, the Secretary shall expedite any proceedings commenced under section 105(a) or (b) of this title. All marine mammals or marine mammal products or other cargo so seized shall be held by any person authorized by the Secretary pending disposition of such proceedings. The owner or consignee of any such marine mammal or marine mammal product or other cargo so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary.

(2) The Secretary may, with respect to any proceeding under section 105(a) or (b) of this title, in lieu of holding any marine mammal or marine mammal product or other cargo, permit the person concerned to post bond or other surety satisfactory to the Secretary pending the disposition of such proceeding.

(3)(A) Upon the assessment of a penalty pursuant to section 105(a) of this title, all marine mammals and marine mammal products or other cargo seized in connection therewith may be proceeded against in any court of competent jurisdiction and forfeited to the Secretary for disposition by him in such manner as he deems appropriate.

(B) Upon conviction for violation of section 105(b) of this title, all marine mammals and marine mammal products seized in connection therewith shall be forfeited to the Secretary for disposition by him in such manner as he deems appropriate. Any other property or item so seized may, at the discretion of the court, be forfeited to the United States or otherwise disposed of.

(4) If with respect to any marine mammal or marine mammal product or other cargo so seized—

(A) a civil penalty is assessed under section 105(a) of this title and no judicial action is commenced to obtain the forfeiture of such mammal or product within thirty days after such assessment, such marine mammal or marine mammal product or other cargo shall be immediately returned to the owner or the consignee; or

(B) no conviction results from an alleged violation of section 105(b) of this title, such marine mammal or marine mammal product or other cargo shall immediately be returned to the owner or consignee if the Secretary does not, with[37] thirty days after the final disposition of the case involving such alleged violation, com-

mence proceedings for the assessment of a civil penalty under section 105(a) of this title.

International Program

16 U.S.C. 1378

Sec. 108. (a) The Secretary, through the Secretary of State, shall—

(1) initiate negotiations as soon as possible for the development of bilateral or multinational agreements with other nations for the protection and conservation of all marine mammals covered by this Act;

(2) initiate—

(A) negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which are found by the Secretary to be unduly harmful to any species or population stock of marine mammal, for the purpose of entering into bilateral and multilateral treaties with such countries to protect marine mammals, with the Secretary of State to prepare a draft agenda relating to this matter for discussion at appropriate international meetings and forums; and

(B) discussions with foreign governments whose vessels harvest yellowfin tuna with purse seines in the eastern tropical Pacific Ocean, for the purpose of concluding, through the Inter-American Tropical Tuna Commission or such other bilateral or multilateral institutions as may be appropriate, international arrangements for the conservation of marine mammals taken incidentally in the course of harvesting such tuna, which should include provisions for (i) cooperative research into alternative methods of locating and catching yellowfin tuna which do not involve the taking of marine mammals, (ii) cooperative research on the status of affected marine mammal population stocks, (iii) reliable monitoring of the number, rate, and species of marine mammals taken by vessels of harvesting nations, (iv) limitations on incidental take levels based upon the best scientific information available, and (v) the use of the best marine mammal safety techniques and equipment that are economically and technologically practicable to reduce the incidental kill and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate;[38]

(3) encourage such other agreements to promote the purposes of this Act with other nations for the protection of specific ocean and land regions which are of special significance to the health and stability of marine mammals;

(4) initiate the amendment of any existing international treaty for the protection and conservation of any species of marine mammal to which the United States is a party in order to make such treaty consistent with the purposes and policies of this Act;

(5) seek the convening of any international ministerial meeting on marine mammals before July 1, 1973, for the purposes of (A) the negotiation of a binding international

convention for the protection and conservation of all marine mammals, and (B) the implementation of paragraph (3) of this section; and

(6) provide to the Congress by not later than one year after the date of the enactment of this Act a full report on the results of his efforts under this section.

(b)(1) In addition to the foregoing, the Secretary shall—

(A) in consultation with the Marine Mammal Commission established by section 201 of this Act, undertake a study of the North Pacific fur seals to determine whether herds of such seals subject to the jurisdiction of the United States are presently at their optimum sustainable population and what population trends are evident; and

(B) in consultation with the Secretary of State, promptly undertake a comprehensive study of the provisions of this Act, as they relate to North Pacific fur seals, and the provisions of the North Pacific Fur Seal Convention signed on February 9, 1957, as extended (hereafter referred to in this subsection as the "Convention"), to determine what modifications, if any, should be made to the provisions of the Convention, or of this Act, or both, to make the Convention and this Act consistent with each other.

The Secretary shall complete the studies required under this paragraph not later than one year after the date of enactment of this Act and shall immediately provide copies thereof to Congress.

(2) If the Secretary finds—

(A) as a result of the study required under paragraph (1)(A) of this subsection, that the North Pacific fur seal herds are below their optimum sustainable population and are not trending upward toward such level, or have reached their optimum sustainable population but are commencing a downward trend, and believes the herds to be in danger of depletion; or

(B) as a result of the study required under paragraph (1)(B) of this subsection, that modifications of the Convention are desirable to make it and this Act consistent;

he shall, through the Secretary of State, immediately initiate negotiations to modify the Convention so as to (i) reduce or halt the taking of seals to the extent required to assure that such herds attain and remain at their optimum sustainable population, or (ii) make the Convention and this Act consistent; or both, as the case may be. If negotiations to so modify the Convention are unsuccessful, the Secretary shall, through the Secretary of State, take such steps as may be necessary to continue the existing Convention beyond its present termination date so as to continue to protect and conserve the North Pacific fur seals and to prevent a return to pelagic sealing.

(c) The Secretary shall include a description of the annual results of discussions initiated and conducted pursuant to subsection (a)(2)(B), as well as any proposals for further action to achieve the purposes of that subsection, in the report required under section 103(f) of this title.[39]

Federal Cooperation with States

16 U.S.C. 1379

Sec. 109. (a) No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b)(1).

(b)(1) Subject to paragraph (2) and subsection (f), the Secretary shall transfer management authority for a species of marine mammal to a State if the Secretary finds, after notice and opportunity for public comment, that the State has developed and will implement a program for the conservation and management of the species that—

(A) is consistent with the purposes, policies, and goals of this Act and with international treaty obligations;

(B) requires that all taking of the species be humane;

(C) does not permit the taking of the species unless and until—

(i) the State has determined, under a process consistent with the standards set forth in subsection (c)—

(I) that the species is at its optimum sustainable population (hereinafter in this section referred to as "OSP"), and

(II) the maximum number of animals of that species that may be taken without reducing the species below its OSP, and

(ii) the determination required under clause (i) is final and implemented under State law, and, if a cooperative allocation agreement for the species is required under subsection (d)(1), such an agreement is implemented;

(D) does not permit the taking of a number of animals of the species that exceeds the maximum number determined pursuant to subparagraph (C)(i)(II), and, in the case of taking for subsistence uses (as defined in subsection (f)(2)), does not permit the taking of a number of animals that would be inconsistent with the maintenance of the species at its OSP;

(E) does not permit the taking of the species for scientific research, public display, or enhancing the survival or recovery of a species or stock, except for taking for such purposes that is undertaken by, or on behalf of, the State;[40]

(F) provides procedures for acquiring data, and evaluating such data and other new evidence, relating to the OSP of the species, and the maximum take that would maintain the species at that level, and, if required on the basis of such evaluation, for amending determinations under subparagraph (C)(i);

(G) provides procedures for the resolution of differences between the State and the Secretary that might arise during the development of a cooperative allocation agreement under subsection (d)(1); and

(H) provides for the submission of an annual report to the Secretary regarding the administration of the program during the reporting period.

(2) During the period between the transfer of management authority for a species to a State under paragraph (1) and the time at which the implementation requirements under paragraph (1)(C)(ii) are complied with—

(A) the State program shall not apply with respect to the taking of the species within the State for any purpose, or under any condition, provided for under section 101; and

(B) the Secretary shall continue to regulate, under this title, all takings of the species within the State.

(3) After the determination required under paragraph (1)(C)(i) regarding a species is final and implemented under State law and after a cooperative allocation agreement described in subsection (d)(1), if required, is implemented for such species—

(A) such determination shall be treated, for purposes of applying this title beyond the territory of the State, as a determination made in accordance with section 103 and as an applicable waiver under section 101(a)(3);

(B) the Secretary shall regulate, without regard to this section other than the allocations specified under such an agreement, the taking of the species—

(i) incidentally in the course of commercial fishing operations (whether provided for under section 101(a)(2) or (4)), or in the course of other specified activities provided for under section 101(a)(5), in the zone described in section 3(14)(B), and

(ii) for scientific research, public display, or enhancing the survival or recovery of a species or stock (other than by, or on behalf of, the State), except that any taking authorized under a permit issued pursuant to section 101(a)(1) after the date of the enactment of the 1981 amendment to this subsection allowing the removal of live animals from habitat within the State shall not be effective if the State agency disapproves, on or before the date of issuance of the permit, such taking as being inconsistent with the State program; and[41]

(C) section 101(b) shall not apply.

(c) The State process required under subsection (b)(1)(C) must comply with the following standards:

(1) The State agency with management authority for the species (hereinafter in this section referred to as the "State agency") must make an initial determination regarding the factors described in clause (i) of that subsection. The State agency must identify, and make available to the public under reasonable circumstances, the documentation

supporting such initial determination. Unless request for a hearing under paragraph (2) regarding the initial determination is timely made, the initial determination shall be treated as final under State law.

(2) The State agency shall provide opportunity, at the request of any interested party, for a hearing with respect to the initial determination made by it under paragraph (1) at which interested parties may—

(A) present oral and written evidence in support of or against such determination; and

(B) cross-examine persons presenting evidence at the hearing.

The State agency must give public notice of the hearing and make available to the public within a reasonable time before commencing the hearing a list of the witnesses for the State and a general description of the documentation and other evidence that will be relied upon by such witnesses.

(3) The State agency, solely on the basis of the record developed at a hearing held pursuant to paragraph (2), must make a decision regarding its initial determination under paragraph (1) and shall include with the record a statement of the findings and conclusions, and the reason or basis therefor, on all material issues.

(4) Opportunity for judicial review of the decision made by the State agency on the record under paragraph (3), under scope of review equivalent to that provided for in section 706(2) (A) through (E) of Title 5, United States Code, must be available under State law. The Secretary may not initiate judicial review of any such decision.

(d)(1) If the range of a species with respect to which a determination under paragraph (1)(C)(i) of subsection (b) is made extends beyond the territorial waters of the State, the State agency and the Secretary (who shall first coordinate with the Marine Mammal Commission and the appropriate Regional Fishery Management Council established under section 302 of the Act of April 13, 1976 (16 U.S.C. 1852)) shall enter into a cooperative allocation agreement providing procedures for allocating, on a timely basis, such of the number of animals, as determined under paragraph (1)(C)(i)(II) of subsection (b), as may be appropriate with priority of allocation being given firstly to taking for subsistence uses in the case of the State of Alaska, and secondly to taking for purposes provided for under section 101(a) within the zone described in section 3(14)(B).

(2) If the State agency requests the Secretary to regulate the taking of a species to which paragraph (1) applies within the zone described in section 3(14)(B) for subsistence uses or for hunting, or both, in a manner consistent with the regulation by the State agency of such taking within the State, the Secretary shall adopt, and enforce within such zone, such of the State agency's regulatory provisions as the Secretary considers to be consistent with his administration of section 101(a) within such zone. The Secretary shall adopt such provisions through the issuance of regulations under section 553 of Title 5, United States Code, and with respect to such issuance the Regulatory Flexibility Act, the Paperwork Reduction Act, Executive Order No. 12291, dated February 17, 1981, and the thirty-day notice requirement in subsection (d) of such section 553 shall not apply. For purposes of sections 105, 106, and 107, such regulations shall be treated as having been issued under this title.

(e)(1) Subject to paragraph (2), the Secretary shall revoke, after opportunity for a hearing, any transfer of management authority made to a State under subsection (b)(1) if the Secretary finds that the State program for the conservation and management of the species concerned is not being implemented, or is being implemented in a manner inconsistent with the provisions of this section or the provisions of the program. The Secretary shall also establish a procedure for the voluntary return by a State to the Secretary of species management authority that was previously transferred to the State under subsection (b)(1).

(2)(A) The Secretary may not revoke a transfer of management authority under paragraph (1) unless—

(i) The Secretary provides to the State a written notice of intent to revoke together with a statement, in detail, of those actions, or failures to act, on which such intent is based; and

(ii) during the ninety-day period after the date of the notice of intent to revoke—

(I) the Secretary provides opportunity for consultation between him and the State concerning such State actions or failures to act and the remedial measures that should be taken by the State, and

(II) the State does not take such remedial measures as are necessary, in the judgment of the Secretary, to bring its conservation and management program, or the administration or enforcement of the program, into compliance with the provisions of this section.

(B) When a revocation by the Secretary of a transfer of management authority to a State becomes final, or the State voluntarily returns management authority to the Secretary, the Secretary shall regulate the taking, and provide for the conservation and management, of the species within the State in accordance with the provisions of this Act (and in the case of Alaskan Natives, section 101(b) and subsection (i) of this section shall apply upon such revocation or return of management authority).

(f)(1) The Secretary may not transfer management authority to the State of Alaska under subsection (b)(1) for any species of marine mammal unless—

(A) the State has adopted and will implement a statute and regulations that insure that the taking of the species for subsistence uses—

(i) is accomplished in a nonwasteful manner,

(ii) will be the priority consumptive use of the species, and

(iii) if required to be restricted, such restriction will be based upon—

(I) the customary and direct dependence upon the species as the mainstay of livelihood,

(II) local residency, and

(III) the availability of alternative resources; and

(B) the State has adopted a statute or regulation that requires that any consumptive use of marine mammal species, other than for subsistence uses, will be authorized during a regulatory year only if the appropriate agency first makes findings, based on an administrative record before it, that—

(i) such use will have no significant adverse impact upon subsistence uses of the species, and

(ii) the regulation of such use, including, but not limited to, licensing of marine mammal hunting guides and the assignment of guiding areas, will, to the maximum extent practicable, provide economic opportunities for the residents of the rural coastal villages of Alaska who engage in subsistence uses of that species.

(2) For purposes of paragraph (1), the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of marine mammals for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of marine mammals taken for personal or family consumption; and for barter, or sharing for personal or family consumption. As used in this paragraph—

(A) The term "family" means all persons related by blood, marriage, or adoption, or any person living within a household on a permanent basis.

(B) The term "barter" means the exchange of marine mammals or their parts, taken for subsistence uses—

(i) for other wildlife or fish or their parts, or

(ii) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

(g) Neither the transfer of management authority to a State under subsection (b)(1), nor the revocation or voluntary return of such authority under subsection (e), shall be deemed to be an action for which an environmental impact statement is required under section 102 of the National Environmental Policy Act of 1969.

(h)(1) Nothing in this title or title III [16 U.S.C. 1421 *et seq.*][42] shall prevent a Federal, State, or local government official or employee or a person designated under section 112(c) from taking, in the course of his or her duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for—

(A) the protection or welfare of the mammal,

(B) the protection of the public health and welfare, or

(C) the nonlethal removal of nuisance animals.

(2) Nothing in this title shall prevent the Secretary or a person designated under section 112(c) from importing a marine mammal into the United States if such importation is necessary to render medical treatment that is not otherwise available.

(3) In any case in which it is feasible to return to its natural habitat a marine mammal taken or imported under circumstances described in this subsection, steps to achieve that result shall be taken.[43]

(i) The Secretary may (after providing notice thereof in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the affected area and providing opportunity for a hearing thereon in such area) prescribe regulations requiring the marking, tagging, and reporting of animals taken pursuant to section 101(b).

(j) The Secretary may make grants to States to assist them—

(1) in developing programs, to be submitted for approval under subsection (b), for the conservation and management of species of marine mammals; and

(2) in administering such programs if management authority for such species is transferred to the State under such subsection.

Grants made under this subsection may not exceed 50 per centum of the costs of developing a State program before Secretarial approval, or of administering the program thereafter.[44]

(k) The Secretary is authorized and directed to enter into cooperative arrangements with the appropriate officials of any State for the delegation to such State of the administration and enforcement of this title: *Provided*, That any such arrangement shall contain such provisions as the Secretary deems appropriate to insure that the purposes and policies of this Act will be carried out.

(l)(1) There are authorized to be appropriated to the Department of the Interior, for the purposes of carrying out this section, not to exceed $400,000 for each of the fiscal years ending September 30, 1979, September 30, 1980, and September 30, 1981.

(2) There are authorized to be appropriated to the Department of Commerce, for the purposes of carrying out this section, not to exceed $225,000 for each of the fiscal years ending September 30, 1979, September 30, 1980, and September 30, 1981.[45]

Marine Mammal Research Grants

16 U.S.C. 1380

Sec. 110. (a)(1) The Secretary is authorized to make grants, or to provide financial assistance in such other form as he deems appropriate, to any Federal or State agency, public or private institution, or other person for the purpose of assisting such agency, institution, or person to undertake research in subjects which are relevant to the protection and conservation of marine mammals. In carrying out this subsection, the Secretary shall undertake a program of, and shall provide financial assistance for, research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals. The Secretary shall include a description of the annual results of research carried out under this section in the report required under section 103(f).[46]

(2) For purposes of identifying appropriate research into promising new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals, the Secretary shall contract for an independent review of information pertaining to such potential alternative methods to be conducted by the National Academy of Sciences with individuals having scientific, technical, or other expertise that may be relevant to the identification of promising alternative fishing techniques. The Secretary shall request that the independent review be submitted to the Secretary on or before September 8, 1989, and the Secretary shall submit the report of the independent review, together with a proposed plan for research, development, and implementation of alternative fishing techniques, to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on or before December 5, 1989.[47]

(b) Any grant or other financial assistance provided by the Secretary pursuant to this section shall be subject to such terms and conditions as the Secretary deems necessary to protect the interests of the United States and shall be made after review by the Marine Mammal Commission.

(c) There are authorized to be appropriated, for the purposes of carrying out this section, not to exceed the following sums for the following fiscal years:

(1) $2,500,000 for each of the fiscal years ending June 30, 1973, June 30, 1974, June 30, 1975, September 30, 1976, and September 30, 1977, of which one-third of the sum appropriated for any such fiscal year shall be available to the Secretary of the Interior and two-thirds of any such sum shall be available to the Secretary of Commerce.

(2) $1,200,000, all of which shall be available to the Secretary of the Interior, for the fiscal year ending September 30, 1978.

(3) $200,000, all of which shall be available to the Secretary of Commerce, for the fiscal year ending September 30, 1978.[48]

(4)(A) $1,300,000 which shall be available to the Secretary of the Interior for the fiscal year ending September 30, 1979.

(B) $2,700,000 which shall be available to the Secretary of Commerce for the fiscal year ending September 30, 1979.

(5)(A) $1,500,000 which shall be available to the Secretary of the Interior for the fiscal year ending September 30, 1980.

(B) $2,700,000 which shall be available to the Secretary of Commerce for the fiscal year ending September 30, 1980.

(6)(A) $2,100,000 which shall be available to the Secretary of the Interior for the fiscal year ending September 30, 1981.

(B) $2,700,000 which shall be available to the Secretary of Commerce for the fiscal year ending September 30, 1981.[49]

Commercial Fisheries Gear Development

16 U.S.C. 1381

Sec. 111. (a) The Secretary of the department in which the National Oceanic and Atmospheric Administration is operating (hereafter referred to in this section as the "Secretary") is hereby authorized and directed to immediately undertake a program of research and development for the purpose of devising improved fishing methods and gear so as to reduce to the maximum extent practicable the incidental taking of marine mammals in connection with commercial fishing. At the end of the full twenty-four calendar month period following the date of the enactment of this Act, the Secretary shall deliver his report in writing to the Congress with respect to the results of such research and development. For the purposes of this section, there is hereby authorized to be appropriated the sum of $1,000,000 for the fiscal year ending June 30, 1973, and the same amount for the next fiscal year. Funds appropriated for this section shall remain available until expended.

(b) The Secretary, after consultation with the Marine Mammal Commission, is authorized and directed to issue, as soon as practicable, such regulations, covering the twenty-four-month period referred to in section 101(a)(2) of this title, as he deems necessary or advisable, to reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations. Such regulations shall be adopted pursuant to section 553 of Title 5, United States Code. In issuing such regulations, the Secretary shall take into account the results of any scientific research under subsection (a) of this section and, in each case, shall provide a reasonable time not exceeding four months for the persons affected to implement such regulations.

(c) Additionally, the Secretary and Secretary of State are directed to commence negotiations within the Inter-American Tropical Tuna Commission in order to effect essential compliance with the regulatory provisions of this Act so as to reduce to the maximum extent feasible the incidental taking of marine mammals by vessels involved in the tuna fishery. The Secretary and Secretary of State are further directed to request the Director of Investigations of the Inter-American Tropical Tuna Commission to make recommendations to all member nations of the Commission as soon as is

practicable as to the utilization of methods and gear devised under subsection (a) of this section.

(d) Furthermore, after timely notice and during the period of research provided in this section, duly authorized agents of the Secretary are hereby empowered to board and to accompany any commercial fishing vessel documented under the laws of the United States, there being space available, on a regular fishing trip for the purpose of conducting research or observing operations in regard to the development of improved fishing methods and gear as authorized by this section. Such research and observation shall be carried out in such manner as to minimize interference with fishing operations. The Secretary shall provide for the cost of quartering and maintaining such agents. No master, operator, or owner of such a vessel shall impair or in any way interfere with the research or observation being carried out by agents of the Secretary pursuant to this section.

Regulations and Administration

16 U.S.C. 1382

Sec. 112. (a) The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this title.

(b) Each Federal agency is authorized and directed to cooperate with the Secretary, in such manner as may be mutually agreeable, in carrying out the purposes of this title.

(c) The Secretary may enter into such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the purposes of this title or title III [16 U.S.C. 1421 *et seq.*] and on such terms as he deems appropriate with any Federal or State agency, public or private institution, or other person.[50]

(d) The Secretary shall review annually the operation of each program in which the United States participates involving the taking of marine mammals on land. If at any time the Secretary finds that any such program cannot be administered on lands owned by the United States or in which the United States has an interest in a manner consistent with the purposes of[51] policies of this Act, he shall suspend the operation of that program and shall include in the annual report to the public and the Congress required under section 103(f) of this Act his reasons for such suspension, together with recommendations for such legislation as he deems necessary and appropriate to resolve the problem.[52]

Application to Other Treaties and Conventions

16 U.S.C. 1383

Sec. 113. The provisions of this title shall be deemed to be in addition to and not in contravention of the provisions of any existing international treaty, convention, or agreement, or any statute implementing the same, which may otherwise apply to the taking of marine mammals. Upon a finding by the Secretary that the provisions of any international treaty, convention, or agreement, or any statute implementing the same has been made applicable to persons subject to the provisions of this title in order to effect essential compliance with the regulatory provisions of this Act so as to reduce to the lowest practicable level the taking of marine mammals incidental to commercial fishing operations, section 105 of this title may not apply to such persons.

Interim Exemption for Commercial Fisheries[53]

16 U.S.C. 1383a

Sec. 114. (a)(1) During the period beginning on the date of enactment of this section and ending October 1, 1993, except as provided in paragraph (2), the provisions of this section, rather than sections 101, 103, and 104, shall govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States and vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)). In any event it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

(2) The provisions of this section other than subsection (e)(6)(A) shall not govern the incidental taking of marine mammals in the course of commercial yellowfin tuna fishing subject to section 104(h)(2) of this title.

(b)(1) The Secretary shall, after consultation with the Marine Mammal Commission—

(A) publish in the Federal Register, for public comment, not later than sixty days after the date of enactment of this section a proposed list of those fisheries, along with a statement of the marine mammals and the approximate number of vessels or persons involved in each such fishery, that have—

(i) frequent incidental taking of marine mammals;

(ii) occasional incidental taking of marine mammals; or

(iii) a remote likelihood of or no known incidental taking of marine mammals;

(B) publish in the Federal Register not later than one hundred and twenty days after the date of enactment of this section a final list of the fisheries and other

information required by paragraph (A), together with a summary of the provisions of this section and information sufficient to advise vessel owners on how to obtain an exemption and otherwise comply with the requirements of this section; and

(C) at least once each year thereafter, and at such other times as the Secretary considers appropriate, reexamine, based on information gathered from the program established under subsections (c), (d), (e), and (f), and other relevant sources and after notice and opportunity for public comment, the classification of fisheries and other determinations required under subparagraph (A) and publish in the Federal Register any necessary changes.

(2)(A) An exemption shall be granted by the Secretary in accordance with this section for a vessel engaged in a fishery identified under paragraph (1)(A) (i) or (ii), upon receipt by the Secretary of a completed registration form providing the name of the vessel owner, the name and description of the vessel, the fisheries in which it will be engaged, and such other information as the Secretary considers necessary. A decal or other physical evidence that the exemption is current and valid shall be issued by the Secretary at the time an exemption is granted, and so long as the exemption remains current and valid, shall be reissued annually thereafter.

(B) No exemption may be granted under this section to the owner of a vessel unless such vessel—

(i) is a vessel of the United States; or

(ii) has a valid fishing permit issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)).

(C) Notwithstanding any other provision of this title, exemptions granted under this section shall authorize the incidental taking of marine mammals, other than California sea otters, from any species or stock, including a population stock designated as depleted, but shall not authorize the intentional lethal taking of any Steller sea lion, any cetacean, or any marine mammals from a population stock designated as depleted.

(3)(A) Beginning two hundred and forty days after the date of enactment of this section, each owner of a vessel engaged in any fishery identified under paragraph (1)(A) (i) or (ii) shall, in order to engage lawfully in that fishery—

(i) have registered with the Secretary in order to obtain for each such vessel owned an exemption for the purpose of incidentally taking marine mammals in accordance with this section;

(ii) ensure that a decal or such other physical evidence of a current and valid exemption as the Secretary may require is displayed on or is in the possession of the master of each such vessel; and

(iii) report as required by subsection (c).

(B) Any owner of a vessel receiving an exemption under this section for any fishery identified under paragraph (1)(A)(i) shall, as a condition of that exemption, take on board a natural resource observer if requested to do so by the Secretary.

(C) An owner of a vessel engaged in a fishery identified under paragraph (1)(A) (i) or (ii) who—

(i) fails to obtain from the Secretary an exemption under this section;

(ii) fails to maintain a current and valid exemption; or

(iii) fails to ensure that a decal or other physical evidence of such exemption issued by the Secretary is displayed on or is in possession[54] of the master of the vessel,

and the master of any such vessel engaged in such fishery, shall be deemed to have violated this title, and shall be subject to the penalties of this title except in the case of unknowing violations before January 1, 1990.

(D) If the owner of a vessel has obtained and maintains a current and valid exemption from the Secretary under this section and meets the requirements set forth in this section, the owner of such vessel, and the master and crew members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals while such vessel is engaged in a fishery to which the exemption applies.

(E) Each owner of a vessel engaged in any fishery not identified in paragraph (1)(A) (i) or (ii), and the master and crew members of such a vessel, shall not be subject to the penalties set forth in this title for the incidental taking of marine mammals if such owner reports to the Secretary, in such form and manner as the Secretary may require, instances of lethal incidental taking in the course of that fishery.

(4) The Secretary shall suspend or revoke an exemption granted under this section and shall not issue a decal or other physical evidence of the exemption for any vessel until the owner of such vessel complies with the reporting requirements under subsection (c) and such requirements to take on board a natural resource observer under paragraph (3)(B) as are applicable to such vessel.

(5)(A) The Secretary shall develop, in consultation with the appropriate States, Regional Fishery Management Councils, and other interested parties, the means by which the granting and administration of exemptions under this section shall be integrated and coordinated, to the maximum extent practicable, with existing fishery licenses, registrations, and related programs.

(B) The Secretary shall utilize newspapers of general circulation, fishery trade associations, electronic media, and other means of advising commercial fishermen of the provisions of this section and the means by which they can comply with its requirements.

(C) The Secretary is authorized to charge a fee for the granting of an exemption under this subsection. The level of fees charged under this subparagraph shall

not exceed the administrative costs incurred in granting an exemption. Fees collected under this subparagraph shall be available to the Under Secretary of Commerce for Oceans and Atmosphere for expenses incurred in the granting and administration of exemptions under this section.

(c) The owner of each vessel holding an exemption granted under subsection (b) of this section shall regularly compile information which shall be used in a report to be submitted to the Secretary at the close of the fishing season or annually, as the Secretary may prescribe. Such report shall be submitted in such form as the Secretary may require and shall include the following:

(1) the type of fishery engaged in by the owner's vessel;

(2) the date and approximate time of any incidental taking of a marine mammal, together with the area in which the incidental taking occurred, the fishing gear used at the time of the incidental taking, and the species of fish involved; and

(3) for each incidental taking, the number and species of marine mammals involved, whether the marine mammals were deterred from gear or catch, incidentally injured, incidentally killed, or lethally removed to protect gear, catch, or human life.

If there was no incidental taking of marine mammals during the reporting period, a report stating that fact shall be filed with the Secretary.

(d)(1) The Secretary shall establish a program to enhance the quality of and verify information received from reports submitted by owners of vessels who have been granted an exemption under subsection (b) of this section. The program shall include, but not be limited to—

(A) education efforts regarding the information that must be submitted;

(B) interviews with fishermen; and

(C) other such information gathering and verification activities that will enable the Secretary to determine reliably the nature, type, and extent of the incidental taking of marine mammals that occurs in a fishery.

Except to the extent authorized by the provisions of subsection (e), the program shall not include placement of observers aboard exempted vessels.

(2) Information obtained under this subsection shall be subject to the confidentiality provisions of subsection (j).

(e)(1) For each fishery identified under subsection (b)(1)(A)(i) of this section, the Secretary shall, after consultation with the appropriate Regional Fishery Management Councils, other Federal and State agencies, and other interested parties, and subject to paragraph (6), place observers on board exempted vessels so as to monitor not less than 20 percent nor more than 35 percent of the fishing operations by vessels in the fishery to obtain statistically reliable information on the species and number of marine mammals incidentally taken in the fishery. If the Secretary determines that fewer than 20 percent of the fishing operations by vessels in the fishery will be monitored during the course of the fishing season, the Secretary shall implement the alternative observa-

tion program described in subsection (f) to the extent necessary to supplement the observer program described in this subsection.

(2) When determining the distribution of observers among fisheries and between vessels in a particular fishery, the Secretary shall be guided by the following standards:

(A) the requirement to obtain the best scientific information available;

(B) the requirement that assignment of observers is fair and equitable among fisheries and among vessels in a fishery;

(C) consistent with paragraph (1), the requirement that no individual person or vessel, or group of persons or vessels, be subject to excessive or overly burdensome observer coverage; and

(D) where practicable, the need to minimize costs and avoid duplication.

(3) If the Secretary finds that, for reasons beyond his or her control, the Secretary cannot assign observers to all the fisheries identified under subsection (b)(1)(A)(i) of this section at the level of observer coverage set forth in paragraph (1), the Secretary shall allocate available observers among such fisheries, consistent with paragraph (2), according to the following priority:

(A) those fisheries that incidentally take marine mammals from any population stock designated as depleted;

(B) those fisheries that incidentally take marine mammals from population stocks that the Secretary believes are declining;

(C) those fisheries other than those described in subparagraphs (A) and (B) in which the greatest incidental take of marine mammals occur; and

(D) any other fishery identified under subsection (b)(1)(A)(i).

The Secretary may, with the consent of the vessel owner, station an observer on board a vessel engaged in a fishery not identified under subsection (b)(1)(A)(i).

(4) Information gathered by observers shall be subject to the provisions of subsection (j). Consistent with the requirements of paragraph (1), the Secretary shall, if requested by the Appropriate Regional Fishery Management Council, or in the case of a State fishery, the State, require observers to collect additional information, including but not limited to the quantities, species, and physical condition of target and non-target fishery resources and, if requested by the Secretary of the Interior, seabirds.

(5) Notwithstanding the provisions of paragraph (4), the Secretary may decline to require observers to collect information described in such paragraph, if the Secretary finds in writing, following public notice and opportunity for comment, that such information will not contribute to the protection of marine mammals or the understanding of the marine ecosystem, including fishery resources and seabirds.

(6) The Secretary shall not be required to place an observer on a vessel in a fishery if the Secretary finds that—

(A) in a situation where harvesting vessels are delivering fish to a processing vessel and the catch is not taken on board the harvesting vessel, statistically reliable information can be obtained from an observer on board the processing vessel to which the fish are delivered;

(B) the facilities of a vessel for the quartering of an observer, or for carrying out observer functions, are so inadequate or unsafe that the health or safety of the observer or the safe operation of the vessel would be jeopardized; or

(C) for reasons beyond the control of the Secretary, an observer is not available.

(7)(A) An observer on a vessel (or the observer's personal representative) under the requirements of this section or section 104 that is ill, disabled, injured, or killed from service as an observer on that vessel may not bring a civil action under any law of the United States for that illness, disability, injury, or death against the vessel or vessel owner, except that a civil action may be brought against the vessel owner for the owner's willful misconduct.

(B) This paragraph does not apply if the observer is engaged by the owner, master, or individual in charge of a vessel to perform any duties in service to the vessel.

(8) There are authorized to be appropriated to the Department of Commerce for the purposes of carrying out this subsection not to exceed $2,700,000 for fiscal year 1989 and not to exceed $8,000,000 for each of the fiscal years 1990, 1991, 1992, and 1993.

(f)(1) The Secretary shall establish an alternative observation program to provide statistically reliable information on the species and number of marine mammals incidentally taken in those fisheries identified pursuant to subsection (b)(1)(A)(i) of this section for which the required level of observer coverage has not been met or for any other fisheries about which such reliable information is not otherwise available. The alternative program shall include, but not be limited to, direct observation of fishing activities from vessels, airplanes, or points on shore.

(2) Individuals engaged in the alternative observation program shall collect scientific information on the fisheries subject to observation, consistent with the requirements of paragraph (1) and subsection (e) (4) and (5). All information collected shall be subject to the provisions of subsection (j).

(g)(1) The Secretary shall review information regarding the incidental taking of marine mammals and evaluate the effects of such incidental taking on the affected population stocks of marine mammals.

(2) If the Secretary finds, based on the information received from the programs established under subsections (c), (d), (e), and (f), that the incidental taking of marine mammals in a fishery is having an immediate and significant adverse impact on a marine mammal population stock or, in the case of Steller sea lions and North Pacific fur seals, that more than 1,350 and 50, respectively, will be incidentally killed during a calendar year, the Secretary shall consult with appropriate Regional Fishery Management Councils and State fishery managers and prescribe emergency regulations to

prevent to the maximum extent practicable any further taking. Any emergency regulations prescribed under this paragraph—

(A) shall, to the maximum extent practicable, avoid interfering with existing State or regional fishery management plans;

(B) shall be published in the Federal Register together with the reasons therefor;

(C) shall remain in effect for not more than one hundred and eighty days or until the end of the fishing season, whichever is earlier; and

(D) may be terminated by the Secretary at an earlier date by publication in the Federal Register of a notice of termination if the Secretary determines the reasons for the emergency regulations no longer exist.

In prescribing emergency regulations under this paragraph, the Secretary shall take into account the economics of the fishery concerned and the availability of existing technology to prevent or minimize incidental taking of marine mammals.

(3) If the Secretary finds, based on information received from the programs established under subsections (c), (d), (e), and (f), that incidental taking of marine mammals in a fishery is not having an immediate and significant adverse impact on a marine mammal population stock but that it will likely have a significant adverse impact over a period of time longer than one year, the Secretary shall request the appropriate Regional Fishery Management Council or State to initiate, recommend, or take such action within its authority as it considers necessary to mitigate the adverse impacts, including adjustments to requirements on fishing times or areas or the imposition of restrictions on the use of vessels or gear.

(4) The Secretary shall impose appropriate conditions and restrictions on an exemption granted under subsection (b) if—

(A) a Regional Fishery Management Council or State does not act in a reasonable period of time on a request made by the Secretary under paragraph (3); or

(B) if the Secretary determines after notice and opportunity for public comment that the purposes of this section would be better served by such action.

(h) The Secretary shall design and implement an information management system capable of processing and analyzing reports received from the programs established under subsections (c), (d), (e), and (f), and other relevant sources, including Federal and State enforcement authorities, marine mammal stranding networks, and the marine mammal researchers. The information shall be made accessible to the public on a continuing basis, but in any case no later than six months after it is received, subject to the provisions of subsection (j).

(i) When carrying out the Secretary's responsibilities under subsections (b), (d), (e), (f), and (h) of this section, the Secretary shall, to the maximum extent practicable, utilize the services and programs of State agencies, Federal agencies (including programs established by Regional Fishery Management Councils), marine fisheries

commissions, universities, and private entities, on a reimbursable basis or otherwise. The Secretary is authorized to enter into contracts and agreements to carry out his or her responsibilities and shall establish appropriate guidelines to ensure that other programs used or contracted for will meet the same standards as a program established by the Secretary. A person contracting with the Secretary to provide observer services under subsection (e) of this section must provide evidence of financial responsibility in an amount and form prescribed by the Secretary to compensate employees (or their survivors) adequately for any illness, disability, injury, or death from service on a vessel.

(j)(1) Any information collected under subsection (c), (d), (e), (f), or (h) of this section shall be confidential and shall not be disclosed except—

(A) to Federal employees whose duties require access to such information;

(B) to State employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person;

(C) when required by court order; or

(D) in the case of scientific information involving fisheries, to employees of Regional Fishery Management Councils who are responsible for fishery management plan development and monitoring.

(2) The Secretary shall prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary shall release or make public any such information in aggregate, summary, or other form which does not directly or indirectly disclose the identity or business of any person.

(k) The Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as necessary and appropriate to carry out the purposes of this section.

(l)(1) The Chairman of the Marine Mammal Commission shall, after consultation with interested parties and not later than February 1, 1990, transmit to the Secretary and make available to the public recommended guidelines to govern the incidental taking of marine mammals in the course of commercial fishing operations, other than those subject to section 104(h)(2), after October 1, 1993. Such guidelines shall be developed by the Commission and its Committee of Scientific Advisers[55] on Marine Mammals and shall—

(A) be designed to provide a scientific rationale and basis for determining how many marine mammals may be incidentally taken under a regime to be adopted to govern such taking after October 1, 1993;

(B) be based on sound principles of wildlife management, and be consistent with and in furtherance of the purposes and policies set forth in this Act; and

(C) to the maximum extent practicable, include as factors to be considered and utilized in determining permissible levels of such taking—

(i) the status and trends of the affected marine mammal population stocks;

(ii) the abundance and annual net recruitment of such stocks;

(iii) the level of confidence in the knowledge of the affected stocks; and

(iv) the extent to which incidental taking will likely cause or contribute to their decline or prevent their recovery to optimum sustainable population levels.

(2) The Secretary shall advise the Chairman of the Commission in writing if the Secretary determines that any additional information or explanation of the Chairman's recommendations is needed, and the Chairman shall respond in writing to any such request by the Secretary.

(3) On or before February 1, 1991, the Secretary, after consultation with the Marine Mammal Commission, Regional Fishery Management Councils, and other interested governmental and nongovernmental organizations, shall publish in the Federal Register, for public comment, the suggested regime that the Secretary considers should, if authorized by enactment of any additional legislation, govern incidental taking of marine mammals, other than those subject to section 104(h)(2), after October 1, 1993. The suggested regime shall include—

(A) the scientific guidelines to be used in determining permissible levels of incidental taking;

(B) a description of the arrangements for consultation and cooperation with other Federal agencies, the appropriate Regional Fishery Management Councils and States, the commercial fishing industry, and conservation organizations; and

(C) a summary of such regulations and legislation as would be necessary to implement the suggested regime.

(4) On or before January 1, 1992, the Secretary, after consultation with the Marine Mammal Commission, and consideration of public comment, shall transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives recommendations pertaining to the incidental taking of marine mammals, other than those subject to section 104(h)(2), after October 1, 1993. The recommendations shall include—

(A) the suggested regime developed under paragraph (3) of this subsection as modified after comment and consultations;

(B) a proposed schedule for implementing the suggested regime; and

(C) such recommendations for additional legislation as the Secretary considers necessary or desirable to implement the suggested regime.

(m) The Secretary shall consult with the Secretary of the Interior prior to taking actions or making determinations under this section that affect or relate to species or population stocks of marine mammals for which the Secretary of the Interior is responsible under this title.

(n) For the purposes of this section, the owner of fixed or other commercial fishing gear that is deployed with or without the use of a vessel shall be deemed to be an owner of a vessel engaged in the fishery in which that gear is deployed.

(o) As used in this section—

(1) the term "fishery" has the same meaning as it does in section 3(8) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(8)).

(2) the term "Secretary" means the Secretary of Commerce.

(3) the term "vessel engaged in a fishery" means a fishing vessel as defined in section 2101(11a) of Title 46, United States Code, or a fish processing vessel as defined in section 2101(11b) of that title, which is engaged in fishery.[56]

(4) the term "vessel of the United States" has the same meaning as it does in section 3(27) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802(27)).

Status Review; Conservation Plans[57]

16 U.S.C. 1383b

Sec. 115. (a)(1) In any action by the Secretary to determine if a species or stock should be designated as depleted, or should no longer be designated as depleted, regardless of whether such action is taken on the initiative of the Secretary or in response to a petition for a status review, the Secretary shall only make such a determination by issuance of a rule, after notice and opportunity for public comment and after a call for information in accordance with paragraph (2).

(2) The Secretary shall make any determination described in paragraph (1) solely on the basis of the best scientific information available. Prior to the issuance of a proposed rule concerning any such determination, the Secretary shall publish in the Federal Register a call to assist the Secretary in obtaining scientific information from individuals and organizations concerned with the conservation of marine mammals, from persons in industry which might be affected by the determination, and from academic institutions. In addition, the Secretary shall utilize, to the extent the Secretary determines to be feasible, informal working groups of interested parties and other methods to gather the necessary information.

(3)(A) If the Secretary receives a petition for a status review as described in paragraph (1), the Secretary shall publish a notice in the Federal Register that such a petition has been received and is available for public review.

(B) Within sixty days after receipt of the petition, the Secretary shall publish a finding in the Federal Register as to whether the petition presents substantial information indicating that the petitioned action may be warranted.

(C) If the Secretary makes a positive finding under subparagraph (B), the Secretary shall include in the Federal Register notice, a finding that—

(i) a review of the status of the species or stock will be commenced promptly; or

(ii) a prompt review of the petition is precluded by other pending status determination petitions and that expeditious progress is being made to process pending status determination petitions under this title.

In no case after making a finding under this subparagraph shall the Secretary delay commencing a review of the status of a species or stock for more than one hundred and twenty days after receipt of the petition.

(D) No later than two hundred and ten days after the receipt of the petition, the Secretary shall publish in the Federal Register a proposed rule as to the status of the species or stock, along with the reasons underlying the proposed status determination. Persons shall have at least sixty days to submit comments on such a proposed rule.

(E) Not later than ninety days after the close of the comment period on a proposed rule issued under subparagraph (D), the Secretary shall issue a final rule on the status of the species or stock involved, along with the reasons for the status determination. If the Secretary finds with respect to such a proposed rule that there is substantial disagreement regarding the sufficiency or accuracy of the available information relevant to a status determination, the Secretary may delay the issuance of a final rule for a period of not more than six months for purposes of soliciting additional information.

(F) Notwithstanding subparagraphs (D) and (E) of this paragraph and section 553 of Title 5, United States Code, the Secretary may issue a final rule as to the status of a species or stock any time sixty or more days after a positive finding under subparagraph (B) if the Secretary determines there is substantial information available to warrant such final status determination and further delay would pose a significant risk to the well-being of any species or stock. Along with the final rule, the Secretary shall publish in the Federal Register detailed reasons for the expedited determination.

(b)(1) The Secretary shall prepare conservation plans—

(A) by December 31, 1989, for North Pacific fur seals;

(B) by December 31, 1990, for Steller sea lions; and

(C) as soon as possible, for any species or stock designated as depleted under this title, except that a conservation plan need not be prepared if the Secretary determines that it will not promote the conservation of the species or stock.

(2) Each plan shall have the purpose of conserving and restoring the species or stock to its optimum sustainable population. The Secretary shall model such plans on recovery plans required under section 4(f) of the Endangered Species Act of 1973 (16 U.S.C. 1533(f)).

(3) The Secretary shall act expeditiously to implement each conservation plan prepared under paragraph (1). Each year, the Secretary shall specify in the annual report prepared under section 103(f) of this title what measures have been taken to prepare and implement such plans.

Authorization of Appropriations[58]

16 U.S.C. 1384

Sec. 116. (a) There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out such functions and responsibilities as it may have been given under title I (other than section 104(h)(3)) of the Marine Mammal Protection Act of 1972, $7,223,000 for fiscal year 1982, $8,000,000 for fiscal year 1983, and $8,800,000 for each of fiscal years 1984, 1985, 1986, 1987, and 1988. There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out such functions and responsibilities as it may have been given under such title (other than section 114(e)(8)), $12,250,000 for fiscal year 1989, $12,740,000 for fiscal year 1990, $13,250,000 for fiscal year 1991, $13,780,000 for fiscal year 1992, and $14,331,000 for fiscal year 1993.[59]

(b) There are authorized to be appropriated to the Department of the Interior, for purposes of carrying out such functions and responsibilities as it may have been given under such title I, $1,600,000 for fiscal year 1982, $1,760,000 for fiscal year 1983, and $2,000,000 for fiscal year 1984, $2,500,000 for fiscal year 1985, $3,000,000 for each of fiscal years 1986, 1987, 1988, and 1989, $3,120,000 for fiscal year 1990, $3,240,000 for fiscal year 1991, $3,370,000 for fiscal year 1992, and $3,500,000 for fiscal year 1993.[60]

Dolphin Protection[61]

16 U.S.C. 1385

Sec. 117. (a) This section may be cited as the "Dolphin Protection Consumer Information Act".

(b) The Congress finds that—

(1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean and high seas driftnet fishing in other parts of the world;

(2) it is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and

(3) consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.

(c) For the purposes of this section—

(1) the terms "driftnet" and "driftnet fishing" have the meanings given those terms in section 4003 of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (16 U.S.C. 1822 note);

(2) the term "eastern tropical Pacific Ocean" means the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and sought America;

(3) the term "label" means a display of written, printed, or graphic matter on or affixed to the immediate container of any article;

(4) the term "Secretary" means the Secretary of Commerce; and

(5) the term "tuna product" means a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life less than 3 days.

(d)(1) It is a violation of section 5 of the Federal Trade Commission Act for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "Dolphin Safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product was harvested using a method of fishing that is not harmful to dolphins if the product contains—

(A) tuna harvested on the high seas by a vessel engaged in driftnet fishing;

(B) tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets which do not meet the requirements for being considered dolphin safe under paragraph (2).

(2) For purposes of paragraph (1)(B), a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean by a fishing vessel using purse seine nets is dolphin safe if—

(A) the vessel is of a type and size that the Secretary has determined is not capable of deploying its purse seine nets on or to encircle dolphins; or

(B)(i) the product is accompanied by a written statement executed by the captain of the vessel which harvested the tuna certifying that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphin;

(ii) the product is accompanied by a written statement executed by—

(I) the Secretary or the Secretary's designee, or

(II) a representative of the Inter-American Tropical Tuna Commission, which states that there was an approved observer on board the vessel during the entire trip and that purse seine nets were not intentionally deployed during the trip on or to encircle dolphin; and

(iii) the statements referred to in clauses (i) and (ii) are endorsed in writing by each exporter, importer, and processor of the product.

(e) Any person who knowingly and willfully makes a statement or endorsement described in subsection (d)(2)(B) that is false is liable for a civil penalty of not to exceed $100,000 assessed in an action brought in any appropriate district court of the United States on behalf of the Secretary.

(f) The Secretary, in consultation with the Secretary of the Treasury, shall issue regulations to implement this section not later than 6 months after the date of the enactment of this Act, including regulations establishing procedures and requirements for ensuring that tuna products are labeled in accordance with subsection (d).

(g) [codified at Section 101(a)(2)(E).]

(h) The Secretary of State shall immediately seek, through negotiations and discussions with appropriate foreign governments, to reduce and, as soon as possible, eliminate the practice of harvesting tuna through the use of purse seine nets intentionally deployed to encircle dolphins.

(i) Subsections (d) and (e) of this section shall take effect 6 months after the date of the enactment of this Act.

Title II—Marine Mammal Commission

Establishment of Commission

16 U.S.C. 1401

Sec. 201. (a) There is hereby established the Marine Mammal Commission (hereafter referred to in this title as the "Commission").

(b)(1) Effective September 1, 1982, the Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate.[62] The President shall make his selection from a list of individuals knowledgeable in the fields of marine ecology and resource management, and who are not in a position to profit from the taking of marine mammals. Such list shall be submitted to him by the Chairman of the Council on Environmental Quality and unanimously agreed to by that Chairman, the Secretary of the Smithsonian Institution, the Director of the National Science Foundation and the Chairman of the National Academy of Sciences.[63] No member of the Commission may, during his period of service on the Commission, hold any other position as an officer or employee of the United States except as a retired officer or retired civilian employee of the United States.

(2) The term of office for each member shall be three years; except that of the members initially appointed to the Commission, the term of one member shall be for one year, the term of one member shall be for two years, and the term of one member shall be for three years. No member is eligible for reappointment; except that any member appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed (A) shall be appointed for the remainder of such term, and (B) is eligible for reappointment for one full term. A member may serve after the expiration of his term until his successor has taken office.

(c) The President shall designate a Chairman of the Commission (hereafter referred to in this title as the "Chairman") from among its members.

(d) Members of the Commission shall each be compensated at a rate equal to the daily equivalent of the rate for GS-18 of the General Schedule under section 5332 of Title 5, United States Code, for each day such member is engaged in the actual performance of duties vested in the Commission. Each member shall be reimbursed for travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5, United States Code, for persons in Government service employed intermittently.

(e) The Commission shall have an Executive Director, who shall be appointed (without regard to the provisions of Title 5, United States Code, governing appointments in the competitive service) by the Chairman with the approval of the Commission and shall be paid at a rate not in excess of the rate for GS-18 of the General Schedule under section 5332 of Title 5, United States Code. The Executive Director shall have such duties as the Chairman may assign.

Duties of Commission

16 U.S.C. 1402

Sec. 202. (a) The Commission shall—

(1) undertake a review and study of the activities of the United States pursuant to existing laws and international conventions relating to marine mammals, including, but not limited to, the International Convention for the Regulation of Whaling, the Whaling Convention Act of 1949, the Interim Convention on the Conservation of North Pacific Fur Seals, and the Fur Seal Act of 1966;

(2) conduct a continuing review of the condition of the stocks of marine mammals, of methods for their protection and conservation, of humane means of taking marine mammals, of research programs conducted or proposed to be conducted under the authority of this Act, and of all applications for permits for scientific research, public display, or enhancing the survival or recovery of a species or stock;[64]

(3) undertake or cause to be undertaken such other studies as it deems necessary or desirable in connection with its assigned duties as to the protection and conservation of marine mammals;

(4) recommend to the Secretary and to other Federal officials such steps as it deems necessary or desirable for the protection and conservation of marine mammals;

(5) recommend to the Secretary of State appropriate policies regarding existing international arrangements for the protection and conservation of marine mammals, and suggest appropriate international arrangements for the protection and conservation of marine mammals;

(6) recommend to the Secretary such revisions of the endangered species list and threatened species list published pursuant to section 4(c)(1) of the Endangered Species Act of 1973, as may be appropriate with regard to marine mammals;[65] and

(7) recommend to the Secretary, other appropriate Federal officials, and Congress such additional measures as it deems necessary or desirable to further the policies of this Act, including provisions for the protection of the Indians, Eskimos, and Aleuts whose livelihood may be adversely affected by actions taken pursuant to this Act.

(b) The Commission shall consult with the Secretary at such intervals as it or he may deem desirable, and shall provide each annual report required under section 204, before submission to Congress, to the Secretary for comment.[66]

(c) The reports and recommendations which the Commission makes shall be matters of public record and shall be available to the public at all reasonable times. All other activities of the Commission shall be matters of public record and available to the public in accordance with the provisions of section 552 of Title 5, United States Code.

(d) Any recommendations made by the Commission to the Secretary and other Federal officials shall be responded to by those individuals within one hundred and twenty days after receipt thereof. Any recommendations which are not followed or adopted

shall be referred to the Commission together with a detailed explanation of the reasons why those recommendations were not followed or adopted.

Committee of Scientific Advisors On Marine Mammals

16 U.S.C. 1403

Sec. 203. (a) The Commission shall establish, within ninety days after its establishment, a Committee of Scientific Advisors on Marine Mammals (hereafter referred to in this title as the "Committee"). Such Committee shall consist of nine scientists knowledgeable in marine ecology and marine mammal affairs appointed by the Chairman after consultation with the Chairman of the Council on Environmental Quality, the Secretary of the Smithsonian Institution, the Director of the National Science Foundation, and the Chairman of the National Academy of Sciences.

(b) Except for United States Government employees, members of the Committee shall each be compensated at a rate equal to the daily equivalent of the rate for GS-18 of the General Schedule under section 5332 of Title 5, United States Code, for each day such member is engaged in the actual performance of duties vested in the Committee. Each member shall be reimbursed for travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5, United States Code, for persons in Government service employed intermittently.

(c) The Commission shall consult with the Committee on all studies and recommendations which it may propose to make or has made, on research programs conducted or proposed to be conducted under the authority of this Act, and on all applications for permits for scientific research. Any recommendations made by the Committee or any of its members which are not adopted by the Commission shall be transmitted by the Commission to the appropriate Federal agency and to the appropriate committees of Congress with a detailed explanation of the Commission's reasons for not accepting such recommendations.

Commission Reports

16 U.S.C. 1404

Sec. 204. The Commission shall transmit to Congress, by January 31 of each year, a report which shall include—

(1) a description of the activities and accomplishments of the Commission during the immediately preceding year; and

(2) all the findings and recommendations made by and to the Commission pursuant to section 202 of this Act together with the responses made to these recommendations.

Coordination With Other Federal Agencies

16 U.S.C. 1405

Sec. 205. The Commission shall have access to all studies and data compiled by Federal agencies regarding marine mammals. With the consent of the appropriate Secretary or Agency head, the Commission may also utilize the facilities or services of any Federal agency and shall take every feasible step to avoid duplication of research and to carry out the purposes of this Act.

Administration of Commission

16 U.S.C. 1406

Sec. 206. The Commission, in carrying out its responsibilities under this title, may—

(1) employ and fix the compensation of such personnel;

(2) acquire, furnish, and equip such office space;

(3) enter into such contracts or agreements with, or provide such grants to, other organizations, both public and private;[67]

(4) procure the services of such experts or consultants or an organization thereof as is authorized under section 3109 of Title 5, United States Code (but at rates for individuals not to exceed $100 per diem); and

(5) incur such necessary expenses and exercise such other powers, as are consistent with and reasonably required to perform its functions under this title; except that no fewer than 11 employees must be employed under paragraph (1) at any time.[68] Financial and administrative services (including those related to budgeting, accounting, financial reporting, personnel, and procurement) shall be provided the Commission by the General Services Administration, for which payment shall be made in advance, or by reimbursement from funds of the Commission in such amounts as may be agreed upon by the Chairman and the Administrator of General Services.

Authorization of Appropriations

16 U.S.C. 1407

Sec. 207. There are authorized to be appropriated to the Marine Mammal Commission, for purposes of carrying out title II of such Act of 1972, $672,000 for fiscal year 1982, $1,000,000 for fiscal year 1983, $1,100,000 for each of fiscal years 1984, 1985, 1986, 1987, 1988, and 1989, $1,140,000 for fiscal year 1990, $1,190,000 for fiscal year 1991, $1,230,000 for fiscal year 1992, and $1,280,000 for fiscal year 1993.[69]

Title III—Global Moratorium to Prohibit Certain Tuna Harvesting Practices[70]

Findings and Policy

16 U.S.C. 1411

Sec. 301. (a) The Congress finds the following:

(1) The yellowfin tuna fishery of the eastern tropical Pacific Ocean has resulted in the deaths of millions of dolphins.

(2) Significant awareness and increased concern for the health and safety of dolphin populations has encouraged a change in fishing methods worldwide.

(3) United States tuna fishing vessels have led the world in the development of fishing methods to reduce dolphin mortalities in the eastern tropical Pacific Ocean and United States tuna processing companies have voluntarily promoted the marketing of tuna that is dolphin safe.

(4) Nations harvesting yellowfin tuna in the eastern tropical Pacific Ocean have indicated their willingness to participate in appropriate multilateral agreements to reduce, and eventually eliminate, dolphin mortality in that fishery.

(b) It is the policy of the United States to—

(1) eliminate the marine mammal mortality resulting from the intentional encirclement of dolphins and other marine mammals in tuna purse seine fisheries;

(2) secure appropriate multilateral agreements to reduce, and eventually eliminate, the mortality referred to in paragraph (1);

(3) ensure that the market of the United States does not act as an incentive to the harvest of tuna caught in association with dolphins or with driftnets;

(4) secure appropriate multilateral agreements to ensure that United States tuna fishing vessels shall have continued access to productive tuna fishing grounds in the South Pacific Ocean and elsewhere; and

(5) encourage observer coverage on purse seine vessels fishing for tuna outside of the eastern tropical Pacific Ocean in a fishery in which the Secretary has determined that a regular and significant association occurs between marine mammals and tuna, and in which tuna is harvested through the use of purse seine nets deployed on or to encircle marine mammals.

International Agreements to Establish Global Moratorium to Prohibit Certain Tuna Harvesting Practices

16 U.S.C. 1412

Sec. 302. (a) The Secretary of State, in consultation with the Secretary, may enter into international agreements which establish, in accordance with this title, a global moratorium of at least 5 years duration to prohibit harvesting tuna through the use of purse seine nets deployed on or to encircle dolphins or other marine mammals.

(b) Any agreement entered into under this section shall—

(1) establish a moratorium described in subsection (a) which takes effect on March 1, 1994;

(2) include an international research program and, notwithstanding the moratorium, authorize harvesting of tuna under that program;

(3) provide for reviews and reports in accordance with section 304 [16 U.S.C. 1414] on results of research conducted under the research program;

(4) require each country that is a party to the agreement to take all the necessary and appropriate steps to ensure compliance with the moratorium; and

(5) encourage each country that is a party to the agreement to seek, through bilateral and multilateral negotiations, to encourage other countries that participate in fisheries to which the agreement applies to become parties to the agreement.

(c) The moratorium authorized under subsection (a) may be terminated prior to December 31, 1999, with respect to the United States for the harvesting of tuna in the eastern tropical Pacific Ocean only if—

(1) the Secretary submits to the Congress in accordance with section 304(b) [16 U.S.C. 1414(b)] a recommendation that the moratorium be terminated; and

(2) the recommendation is approved by enactment of a joint resolution of approval.

Research Programs

16 U.S.C. 1413

Sec. 303. (a) An agreement entered into under section 302 [16 U.S.C. 1412] shall—

(1) establish an international research program to develop methods of fishing for large yellowfin tuna—

(A) without setting nets on dolphins or other marine mammals; or

(B) by setting nets on dolphins or other marine mammals with zero set-caused mortality;

(2) require that proposals for research under the program be reviewed and authorized by a competent regional organization;

(3) require that research under the program be conducted by dedicated vessels that—

(A) are authorized to conduct that research by a competent regional organization; and

(B) have on board in accordance with section 305(a)(2) [16 U.S.C. 1415(a)(2)] an observer who is responsible to, and supervised by, a competent regional organization.

(b) For the eastern tropical Pacific Ocean, an agreement entered into under section 302 [16 U.S.C. 1412] shall require that—

(1) the total number of research sets on dolphins conducted pursuant to this section during the period beginning March 1, 1994, and ending December 31, 1999, shall not exceed 400 annually, and that the total annual dolphin mortality shall not exceed 1,000;

(2) the Inter-American Tropical Tuna Commission shall establish a panel to review and report on the compliance of the international yellowfin tuna fishery fleet with the limits established in paragraph (1) and make recommendations as appropriate; and

(3) the Inter-American Tropical Tuna Commission shall establish an Advisory Board of technical specialists from the international communities of scientists, government agencies, environmental groups, and the fishing industry, to assist that commission in efforts to coordinate, facilitate, and guide research.

(c) (1) An agreement entered into under section 302 [16 U.S.C. 1412] shall establish fair and equitable mechanisms for funding research conducted pursuant to this section.

(2) An agreement entered into under section 302 [16 U.S.C. 1412] shall provide that the proceeds of any tuna harvested for the purpose of research conducted pursuant to this section should, to the extent possible, be used for funding research conducted pursuant to this section.

(3) Funding provided by the United States for research shall be used only for the purpose of developing methods of fishing for large yellowfin tuna that do not involve intentionally encircling dolphins or other marine mammals.

(d) The Marine Mammal Commission established under section 201 shall—

(1) review all research proposals submitted to the Inter-American Tropical Tuna Commission; and

(2) recommend an appropriate response to each of those proposals, to the United States Commissioners on the Inter-American Tropical Tuna Commission.

Reviews, Reports, and Recommendations

16 U.S.C. 1414

Sec. 304. (a) The Secretary shall submit annual reports to the Congress which include—

(1) results of research conducted pursuant to section 303 [16 U.S.C. 1413];

(2) a description of the status of stocks of yellowfin tuna;

(3) an assessment of the economic impacts on the tuna industry and consumers caused by the moratorium established by agreements entered into under section 302 [16 U.S.C. 1412];

(4) an assessment of the effectiveness of the moratorium in protecting dolphin populations in the eastern tropical Pacific Ocean;

(5) results of reviews conducted under section 305(c) [16 U.S.C. 1415(c)];

(6) copies of any international agreements or undertakings authorized by or related to this title;

(7) an assessment of the impact on fishery resources, other than yellowfin tuna, of methods of fishing for large yellowfin tuna in the eastern tropical Pacific Ocean that do not involve the intentional encirclement of dolphins; and

(8) any other relevant information.

(b) If a competent regional organization under the auspices of which research is conducted pursuant to section 303 [16 U.S.C. 1413], or any country which participates in such an organization, submits to the United States a recommendation that a moratorium established by agreements entered into under section 302 [16 U.S.C. 1412] should be terminated prior to December 31, 1999, the Secretary shall—

(1) review the information on which the recommendation is based;

(2) consult with relevant Federal agencies, including the Marine Mammal Commission, and other interested persons; and

(3) submit to the Congress a recommendation regarding the termination of the moratorium.

International Commitments

16 U.S.C. 1415

Sec. 305. (a) Except as provided in subsection (b), the Secretary of the Treasury shall not, under section 101(a)(2) (A) and (B), ban the importation of yellowfin tuna or yellowfin tuna products from a country that transmits to the Secretary of State a formal communication in which the country commits to—

(1) implement a moratorium of at least 5 years duration beginning March 1, 1994, on the practice of harvesting tuna through the use of purse seine nets deployed on or to encircle dolphins or other marine mammals unless the moratorium is terminated in accordance with section 302(c) [16 U.S.C. 1412(c)];

(2) require an observer on each vessel of the country larger than 400 short tons carrying capacity which engages in purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean, and ensure that at least 50 percent of all such observers are responsible to, and supervised by, a competent regional organization;

(3) reduce the dolphin mortality resulting from purse seine net operations conducted by vessels of the country in 1992 to a level that is lower than such mortality in 1991 by a statistically significant margin; and

(4) reduce the dolphin mortality resulting from purse seine net operations conducted by vessels of the country in the period beginning January 1, 1993, and ending February 28, 1994, to a level that is lower than such mortality in 1992 by a statistically significant margin.

(b)(1) The Secretary, in consultation with the Secretary of State, shall periodically determine whether each country which has transmitted a formal communication expressing the commitments described in subsection (a) is fully implementing those commitments. If the Secretary determines that any such country is not implementing those commitments—

(A) the Secretary shall notify the President and the Congress of that determination; and

(B) 15 days after such notification, the Secretary of the Treasury shall ban the importation from that country of all yellowfin tuna and yellowfin tuna products.

(2)(A) If—

(i) a country does not, within 60 days after the establishment with respect to that country of a ban on importation under paragraph (1)(B), certify and provide reasonable proof to the Secretary that the country has fully implemented the commitment described in subsection (a)(1) or has taken the necessary actions to remedy its failure to comply with the commitments described in subsection (a)(2), (3), and (4); and

(ii) the Secretary does not, before the end of that 60-day period, certify to the President that the country has provided such certification and proof;

the President shall direct the Secretary of the Treasury to ban the importation from that country of all articles (other than those subject to an importation ban under paragraph (1)(B) that are classified under one or more of those fish and fish product categories that the President, subject to subparagraph (B), considers appropriate to carry out this paragraph.

(B) The one or more fish and fish product categories to which the President imposes an import ban under subparagraph (A) with respect to a country must be a fish and fish product category or categories with respect to which the articles classified thereunder and imported from that country in the base year had an aggregate customs valuation equal to 40 percent of the aggregate customs valuation of all articles classified under all fish and fish product categories that were imported from that country during the base year.

(C) For purposes of subparagraph (B), the term "base year" means the calendar year immediately occurring before the calendar year in which the import ban under subparagraph (A) commences with respect to the country.

(3) Bans on importation imposed under paragraphs (1) and (2) with respect to a country shall continue in effect until the Secretary determines that the country is implementing the commitments described in subsection (a).

(4) The Secretary of the Treasury shall take such action as may be necessary or appropriate to implement importation bans imposed under paragraphs (1) and (2).

(c) The Secretary, in consultation with the Secretary of State, shall—

(1) periodically review the activities of countries which have transmitted to the Secretary of State formal communications expressing the commitments described in subsection (a), to determine whether those countries are complying with those commitments; and

(2) include the results of those reviews in annual reports submitted to the Congress pursuant to section 304(a) [16 U.S.C. 1414(a)].

Permits for Taking Dolphins

16 U.S.C. 1416

Sec. 306. (a) Notwithstanding section 104(h), the general permit issued to the American Tunaboat Association on December 1, 1980, shall be subject to the following additional restrictions:

(1) Total dolphin mortalities (including mortalities resulting from research) authorized by the permit shall not exceed 1,000 during the period beginning January 1, 1992, and ending December 31, 1992, and 800 during the period beginning January 1, 1993, and ending March 1, 1994.

(2) No purse seine net may be deployed under the permit on or to encircle any school of dolphins in which any eastern spinner dolphin (Stenella longirostris) or coastal spotted dolphin (Stenella attenuata) is observed prior to release of the net skiff.

(3) The permit shall expire March 1, 1994, unless no major purse seine tuna fishing country enters into an agreement with the Secretary in accordance with section 302 [16 U.S.C. 1412] before that date (notwithstanding any agreement under that section with a country that is not a major purse seine tuna fishing country).

(4) If no major purse seine tuna fishing country enters into an agreement with the Secretary in accordance with section 302 [16 U.S.C. 1412] before March 1, 1994, and notwithstanding any agreement under that section with a country that is not a major purse seine tuna fishing country—

(A) the total dolphin mortalities authorized by the permit for each year after 1992, including mortalities caused by research, shall not exceed the number of dolphin mortalities which occurred under the permit during the preceding year;

(B) the total dolphin mortalities occurring under the permit each year shall continue to be reduced by statistically significant amounts each year to levels approaching zero by December 31, 1999;

(C) the permit shall be subject to any additional restrictions that the Secretary considers appropriate; and

(D) the permit shall expire December 31, 1999.

(b) An agreement entered into under section 302 [16 U.S.C. 1412] shall not supersede or be interpreted to supersede any provision of this Act under which a permit under this Act is required for activities conducted pursuant to this title.

(c) For purposes of this section, the term "major purse seine tuna fishing country" means a country which on the effective date of this title has an active purse seine tuna fishing fleet of 20 or more vessels.

Prohibitions

16 U.S.C. 1417

Sec. 307. (a) It is unlawful—

(1) for any person, after June 1, 1994, to sell, purchase, offer for sale, transport, or ship, in the United States, any tuna or tuna product that is not dolphin safe;

(2) for any person or vessel that is subject to the jurisdiction of the United States, intentionally to set a purse seine net on or to encircle any marine mammal during any tuna fishing operation after February 28, 1994, except—

(A) as necessary for scientific research approved by the Inter-American Tropical Tuna Commission;

(B) in accordance with a recommendation that is approved under section 302(c)(2) [16 U.S.C. 1412(c)(2)]; or

(C) as authorized by the general permit issued to the American Tunaboat Association on December 1, 1980 (including any additional restrictions applicable under section 306(a) [16 U.S.C. 1416(a)]), notwithstanding any agreement under section 302 [16 U.S.C. 1412] with a country that is not a major purse seine tuna fishing country (as that term is defined in section 306(c) [16 U.S.C. 1416(c)]);

(3) for any person to import any yellowfin tuna or yellowfin tuna product or any other fish or fish product in violation of a ban on importation imposed under section 305(b) (1) or (2) [16 U.S.C. 1415(b) (1) or (2)];

(4) for any person to violate any regulation promulgated under this title;

(5) for any person to refuse to permit any duly authorized officer to board a vessel subject to that person's control for purposes of conducting any search or inspection in connection with the enforcement of this title; and

(6) for any person to assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection described in paragraph (5).

(b)(1) A person that knowingly and willfully violates subsection (a) (1), (2), (3), (4), or (5) shall be subject to a civil penalty under section 105(a).

(2) A person that knowingly and willfully violates subsection (a)(6) shall be subject to a criminal penalty under section 105(b).

(c) Any vessel (including its fishing gear, appurtenances, stores, and cargo) used, and any fish (or its fair market value) taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by this section shall be subject to forfeiture to the United States in the manner provided in section 310 of the Magnuson Fishery Conservation and Management Act.

(d) For purposes of this section, tuna or a tuna product is dolphin safe if—

(1) it does not contain tuna that was harvested on the high seas by a vessel engaged in driftnet fishing, as that term is defined in section 4003 of the Driftnet Impact, Monitoring, Assessment, and Control Act of 1987;

(2) in the case of tuna or a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean, it is dolphin safe under subsection (d)(2) of the Dolphin Protection Consumer Information Act;

(3) in the case of tuna or a tuna product that contains tuna harvested outside the eastern tropical Pacific Ocean by a purse seine vessel, it is accompanied by a written statement executed by the captain of the vessel certifying that no purse seine net was

intentionally deployed on or to encircle dolphins during the particular voyage on which the tuna was harvested; and

(4) in the case of tuna or a product that contains tuna harvested outside the eastern tropical Pacific Ocean by a purse seine vessel in a fishery in which the Secretary has determined that a regular and significant association occurs between marine mammals and tuna, and in which tuna is harvested through the use of purse seine nets deployed on or to encircle marine mammals, it is accompanied by a written statement executed by the captain of the vessel and by an observer, certifying that no purse seine net was intentionally deployed on or to encircle marine mammals during the particular voyage on which the tuna was harvested.

Authorization of Appropriations

16 U.S.C. 1418

Sec. 308. There are authorized to be appropriated to the National Marine Fisheries Service for carrying out section 303 [16 U.S.C. 1413], $3,000,000 for each of the fiscal years 1993, 1994, 1995, 1996, 1997, and 1998.

Title III—Marine Mammal Health and Stranding Response[71]

Establishment of Program

16 U.S.C. 1421

Sec. 301. (a) The Secretary shall, in consultation with the Secretary of the Interior, the Marine Mammal Commission, and individuals with knowledge and experience in marine science, marine mammal science, marine mammal veterinary and husbandry practices, and marine conservation, including stranding network participants, establish a program to be known as the "Marine Mammal Health and Stranding Response Program".

(b) The purposes of the Program shall be to—

(1) facilitate the collection and dissemination of reference data on the health of marine mammals and health trends of marine mammal populations in the wild;

(2) correlate the health of marine mammals and marine mammal populations, in the wild, with available data on physical, chemical, and biological environmental parameters; and

(3) coordinate effective responses to unusual mortality events by establishing a process in the Department of Commerce in accordance with section 304 [16 U.S.C. 1421c].

Determination; Data Collection and Dissemination

16 U.S.C. 1421a

Sec. 302. (a) The Secretary shall, in consultation with the Secretary of the Interior, the Marine Mammal Commission, and individuals with knowledge and experience in marine science, marine mammal science, marine mammal veterinary and husbandry practices, and marine conservation, including stranding network participants, develop objective criteria, after an opportunity for public review and comment, to provide guidance for determining at what point a rehabilitated marine mammal is releasable to the wild.

(b) The Secretary shall, in consultation with the Secretary of the Interior, collect and update, periodically, existing information on—

(1) procedures and practices for—

(A) rescuing and rehabilitating stranded marine mammals, including criteria used by stranding network participants, on a species-by-species basis, for determining at what point a marine mammal undergoing rescue and rehabilitation is returnable to the wild; and

(B) collecting, preserving, labeling, and transporting marine mammal tissues for physical, chemical, and biological analyses;

(2) appropriate scientific literature on marine mammal health, disease, and rehabilitation;

(3) strandings, which the Secretary shall compile and analyze, by region, to monitor species, numbers, conditions, and causes of illnesses and deaths of stranded marine mammals; and

(4) other life history and reference level data, including marine mammal tissue analyses, that would allow comparison of the causes of illness and deaths in stranded marine mammals with physical, chemical, and biological environmental parameters.

(c) The Secretary shall make information collected under this section available to stranding network participants and other qualified scientists.

Stranding Response Agreements

16 U.S.C. 1421b

Sec. 303. (a) The Secretary may enter into an agreement under section 112(c) with any person to take marine mammals under section 109(h)(1) in response to a stranding.

(b) An agreement authorized by subsection (a) shall—

(1) specify each person who is authorized to perform activities under the agreement; and

(2) specify any terms and conditions under which a person so specified may delegate that authority to another person.

(c) The Secretary shall periodically review agreements under section 112(c) that are entered into pursuant to this title, for performance adequacy and effectiveness.

Unusual Mortality Event Response

16 U.S.C. 1421c

Sec. 304. (a)(1)(A) The Secretary, acting through the Office, shall establish, in consultation with the Secretary of the Interior, a marine mammal unusual mortality event working group, consisting of individuals with knowledge and experience in marine science, marine mammal science, marine mammal veterinary and husbandry practices, marine conservation, and medical science, to provide guidance to the Secretary and the Secretary of the Interior for—

(i) determining whether an unusual mortality event is occurring;

(ii) determining, after an unusual mortality event has begun, if response actions with respect to that event are no longer necessary; and

(iii) developing the contingency plan in accordance with subsection (b), to assist the Secretary in responding to unusual mortality events.

(B) The Federal Advisory Committee Act (5 App. U.S.C.) shall not apply to the marine mammal unusual mortality event working group established under this paragraph.

(2) The Secretary, in consultation with the Secretary of the Interior, shall to the extent necessary and practicable—

(A) within 24 hours after receiving notification from a stranding network participant that an unusual mortality event might be occurring, contact as many members as is possible of the unusual mortality event working group for guidance; and

(B) within 48 hours after receiving such notification—

(i) make a determination as to whether an unusual mortality event is occurring;

(ii) inform the stranding network participant of that determination; and

(iii) if the Secretary has determined an unusual mortality event is occurring, designate an Onsite Coordinator for the event, in accordance with subsection (c).

(b)(1) The Secretary shall, in consultation with the Secretary of the Interior and the unusual mortality event working group, and after an opportunity for public review and comment, issue a detailed contingency plan for responding to any unusual mortality event.

(2) The contingency plan required under this subsection shall include—

(A) a list of persons, including stranding network participants, at a regional, State, and local level, who can assist the Secretary in implementing a coordinated and effective response to an unusual mortality event;

(B) the types of marine mammal tissues and analyses necessary to assist in diagnosing causes of unusual mortality events;

(C) training, mobilization, and utilization procedures for available personnel, facilities, and other resources necessary to conduct a rapid and effective response to unusual mortality events; and

(D) such requirements as are necessary to—

(i) minimize death of marine mammals in the wild and provide appropriate care of marine mammals during an unusual mortality event;

(ii) assist in identifying the cause or causes of an unusual mortality event;

(iii) determine the effects of an unusual mortality event on the size estimates of the affected populations of marine mammals; and

(iv) identify any roles played in an unusual mortality event by physical, chemical, and biological factors, including contaminants.

(c)(1)(A) The Secretary shall, in consultation with the Secretary of the Interior, designate one or more Onsite Coordinators for an unusual mortality event, who shall make immediate recommendations to the stranding network participants on how to proceed with response activities.

(B) An Onsite Coordinator so designated shall be one or more appropriate Regional Directors of the National Marine Fisheries Service or the United States Fish and Wildlife Service, or their designees.

(C) If, because of the wide geographic distribution, multiple species of marine mammals involved, or magnitude of an unusual mortality event, more than one Onsite Coordinator is designated, the Secretary shall, in consultation with the Secretary of the Interior, designate which of the Onsite Coordinators shall have primary responsibility with respect to the event.

(2)(A) An Onsite Coordinator designated under this subsection shall coordinate and direct the activities of all persons responding to an unusual mortality event in accordance with the contingency plan issued under subsection (b), except that—

(i) with respect to any matter that is not covered by the contingency plan, an Onsite Coordinator shall use his or her best professional judgment; and

(ii) the contingency plan may be temporarily modified by an Onsite Coordinator, consulting as expeditiously as possible with the Secretary, the Secretary of the Interior, and the unusual mortality event working group.

(B) An Onsite Coordinator may delegate to any qualified person authority to act as an Onsite Coordinator under this title.

Unusual Mortality Event Activity Funding

16 U.S.C. 1421d

Sec. 305. (a) There is established in the Treasury a fund to be known as the "Marine Mammal Unusual Mortality Event Fund", which shall consist of amounts deposited into the Fund under subsection (c).

(b)(1) Amounts in the Fund—

(A) shall be available only for use by the Secretary, in consultation with the Secretary of the Interior—

(i) to compensate persons for special costs incurred in acting in accordance with the contingency plan issued under section 304(b) [16 U.S.C. 1421c(b)] or under the direction of an Onsite Coordinator for an unusual mortality event; and

(ii) for reimbursing any stranding network participant for costs incurred in preparing and transporting tissues collected with respect to an unusual mortality event for the Tissue Bank; and

(B) shall remain available until expended.

(2) If sufficient amounts are not available in the Fund to satisfy any authorized pending claim, such claim shall remain pending until such time as sufficient amounts are available. All authorized pending claims shall be satisfied in the order received.

(c) There shall be deposited into the Fund—

(1) amounts appropriated to the Fund;

(2) other amounts appropriated to the Secretary for use with respect to unusual mortality events; and

(3) amounts received by the United States in the form of gifts, devises, and bequests under subsection (d).

(d) For purposes of carrying out this title, the Secretary may accept, solicit, and use the services of volunteers, and may accept, solicit, receive, hold, administer, and use gifts, devises, and bequests.

Liability

16 U.S.C. 1421e

Sec. 306. (a) A person who is authorized to respond to a stranding pursuant to an agreement entered into under section 112(c) is deemed to be an employee of the government for purposes of chapter 171 of title 28, United States Code, with respect to actions of the person that are—

(1) in accordance with the agreement; and

(2) in the case of an unusual mortality event, in accordance with—

(A) the contingency plan issued under section 304(b) [16 U.S.C. 1421c(b)];

(B) the instructions of an Onsite Coordinator designated under section 304(c) [16 U.S.C. 1421c(c)]; or

(C) the best professional judgment of an Onsite Coordinator, in the case of any matter that is not covered by the contingency plan.

(b) Subsection (a) does not apply to actions of a person described in that subsection that are grossly negligent or that constitute willful misconduct.

National Marine Mammal Tissue Bank and Tissue Analysis

16 U.S.C. 1421f

Sec. 307. (a)(1) The Secretary shall make provision for the storage, preparation, examination, and archiving of marine mammal tissues. Tissues archived pursuant to this subsection shall be known as the "National Marine Mammal Tissue Bank".

(2) The Secretary shall, in consultation with individuals with knowledge and expertise in marine science, marine mammal science, marine mammal veterinary and husbandry practices, and marine conservation, issue guidance, after an opportunity for public review and comment, for marine mammal tissue collection, preparation, archiving, and quality control procedures, regarding—

(A) appropriate and uniform methods and standards for those activities to provide confidence in marine mammal tissue samples used for research; and

(B) documentation of procedures used for collecting, preparing, and archiving those samples.

(3) In addition to tissues taken during marine mammal unusual mortality events, the Tissue Bank shall incorporate tissue samples taken from other sources in the wild, including—

(A) samples from marine mammals taken incidental to commercial fishing operations;

(B) samples from marine mammals taken for subsistence purposes;

(C) biopsy samples; and

(D) any other samples properly collected.

(b) The Secretary shall, in consultation with the Marine Mammal Commission, the Secretary of the Interior, and individuals with knowledge and experience in marine science, marine mammal science, marine mammal veterinary and husbandry practices, and marine conservation, issue guidance, after an opportunity for public review and comment, for analyzing tissue samples (by use of the most effective and advanced diagnostic technologies and tools practicable) as a means to monitor and measure overall health trends in representative species or populations of marine mammals, including—

(1) the levels of, and if possible, the effects of, potentially harmful contaminants; and

(2) the frequency of, and if possible, the causes and effects of abnormal lesions or anomalies.

(c)(1) The Secretary shall maintain a central data base which provides an effective means for tracking and accessing data on marine mammals, including relevant data on marine mammal tissues collected for and maintained in the Tissue Bank.

(2) The data base established under this subsection shall include—

(A) reference data on the health of marine mammals and populations of marine mammals; and

(B) data on species of marine mammals that are subject to unusual mortality events.

(d) The Secretary shall, in consultation with the Secretary of the Interior, establish criteria, after an opportunity for public review and comment, for access to—

(1) marine mammal tissues in the Tissue Bank;

(2) analyses conducted pursuant to subsection (b); and

(3) marine mammal data in the data base maintained under subsection (c);

which provide for appropriate uses of the tissues, analyses, and data by qualified scientists, including stranding network participants.

Authorization of Appropriations

16 U.S.C. 1421g

Sec. 308. There is authorized to be appropriated—

(1) to the Secretary for carrying out this title (other than sections 305 [16 U.S.C. 1421d] and 307 [16 U.S.C. 1421f]) $250,000 for each of fiscal years 1993 and 1994;

(2) to the Secretary for carrying out section 307 [16 U.S.C. 1421f], $250,000 for each of fiscal years 1993 and 1994; and

(3) to the Fund, $500,000 for fiscal year 1993.

Definitions

16 U.S.C. 1421h

Sec. 309. In this title, the following definitions apply:

(1) The term "Fund" means the Marine Mammal Unusual Mortality Event Fund established by section 305(a) [16 U.S.C. 1421d].

(2) The term "Office" means the Office of Protected Resources, in the National Marine Fisheries Service.

(3) The term "stranding" means an event in the wild in which—

(A) a marine mammal is dead and is—

(i) on a beach or shore of the United States; or

(ii) in waters under the jurisdiction of the United States (including any navigable waters); or

(B) a marine mammal is alive and is—

(i) on a beach or shore of the United States and unable to return to the water;

(ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention; or

(iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.

(4) The term "stranding network participant" means a person who is authorized by an agreement under section 112(c) to take marine mammals as described in section 109(h)(1) in response to a stranding.

(5) The term "Tissue Bank" means the National Marine Tissue Bank provided for under section 307(a) [16 U.S.C. 1421f].

(6) The term "unusual mortality event" means a stranding that—

(A) is unexpected;

(B) involves a significant die-off of any marine mammal population; and

(C) demands immediate response.

Notes

16 U.S.C. 1361 note

The following section 7, of Pub. L. 100-711, approved November 23, 1988, has not been codified.

Study on Mortality of Atlantic Dolphin

Sec. 7. (a) The Secretary of Commerce shall conduct a study regarding the east coast epidemic during 1987 and 1988 which has caused substantial mortality within the North Atlantic coastal population of Atlantic bottle-nosed dolphin. The study shall examine—

(1) the cause or causes of the epidemic;

(2) the effect of the epidemic on coastal and offshore populations of Atlantic bottle-nosed dolphin;

(3) the extent to which pollution may have contributed to the epidemic;

(4) whether other species and populations of marine mammals were affected by those factors which contributed to the epidemic; and

(5) any other matters pertaining to the causes and effects of the epidemic.

(b) On or before January 1, 1989, the Secretary shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a plan for conducting the study required in subsection (a).

16 U.S.C. 1361 note

The following section 306, of Pub. L. 102-567, enacted October 29, 1992, has not been codified.

Study on Effects of Dolphin Feeding

Sec. 306. (a) The Secretary of Commerce shall conduct a study in the eastern Gulf of Mexico on the effects of feeding of noncaptive dolphins by human beings. The study conducted pursuant to this section shall be designed to detect any behavior or diet modification resulting from this feeding and to identify the effects, if any, of these modifications on the health and well-being of the dolphins.

(b) In design and conduct of the study required under subsection (a), the Secretary shall consult with the National Academy of Sciences and the Marine Mammal Commission.

(c) Within 18 months after the date of the enactment of this Act, the Secretary shall submit to the Committee on Merchant Marine and Fisheries of the House of Represen-

tatives and the Committee on Commerce, Science, and Transportation of the Senate a report on the results of the study conducted pursuant to subsection (a).

16 U.S.C. 1373 note

The following section 1101, of Pub. L. 101-627, approved November 28, 1990, has not been codified.

Report on Marine Mammal Populations

Sec. 1101. The Secretary of Commerce, in consultation with the Secretary of the Interior, shall provide to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives within 12 months after the date of enactment of this Act a report—

(1) assessing population sizes and trends of harbor seals, sea otters, California sea lions, and northern sea lions off the coast of the State of Washington, which assessment shall include the historic, present, and projected population sizes and the overall health of current populations of such marine mammals;

(2) assessing the effectiveness of sections 101(a)(3)(A) and 109(h) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)(3)(A) and 1379(h)) with particular emphasis on the management of the lower Columbia River and Puget Sound marine mammal populations, which assessment shall describe how the agencies are interpreting and implementing such sections, how often such sections have been invoked, and whether such sections have been effective in the management of marine mammal populations and in responding to the problems which such sections were intended to address; and

(3) specifying long range management plans for the species of marine mammals listed in paragraph (1).

16 U.S.C. 1379 note

The following section 4(b), of Pub. L. 97-58, approved October 9, 1981, does not amend the Act, but should be linked with it.

No Effect on Certain Cooperative Agreements

Sec. 4. (b) Nothing in the amendments made by subsection (a) shall be construed as affecting in any manner, or to any extent, any cooperative agreement entered into by a State under section 6(c) of the Endangered Species Act of 1973 (16 U.S.C. 1535(c)) before, on, or after the date of the enactment of this Act.

16 U.S.C. 1421a note

The following section 3003(b), of Pub. L. 102-587, enacted November 4, 1992, has not been codified.

Marine Mammal Health and Stranding Response Program

Sec. 3003. (b) The Secretary of Commerce shall—

(1) in accordance with section 302 (a) and (b) of the Marine Mammal Protection Act of 1972, as amended by this Act [16 U.S.C. 1421a (a) and (b)], and not later than 24 months after the date of enactment of this Act—

(A) develop and implement objective criteria to determine at what point a marine mammal undergoing rehabilitation is returnable to the wild; and

(B) collect and make available information on marine mammal health and health trends; and

(2) in accordance with section 304(b) of the Marine Mammal Protection Act of 1972, as amended by this Act [16 U.S.C. 1421c(b)], issue a detailed contingency plan for responding to any unusual mortality event—

(A) in proposed form by not later than 18 months after the date of enactment of this Act; and

(B) in final form by not later than 24 months after the date of enactment of this Act.

Endnotes for The Marine Mammal Protection Act of 1972 as Amended

1. The Act (Pub. L. 92-522), approved October 21, 1972, has been amended also by Pub. L. 93-205 (the Endangered Species Act), December 28, 1973; Pub. L. 94-265 (the Magnuson Fisheries Conservation and Management Act), April 13, 1976; Pub. L. 95-136, October 18, 1977; Pub. L. 95-316, July 10, 1978; Pub. L. 96-470 (the Congressional Reports Elimination Act of 1980), October 19, 1980; Pub. L. 97-58, October 9, 1981; Pub. L. 97-389 (the Fisheries Amendments of 1982), December 29, 1982; Pub. L. 98-364, July 17, 1984; Pub. L. 99-659, November 14, 1986; Pub. L. 100-711 (the Marine Mammal Protection Act Amendments of 1990), November 23, 1988; Pub. L. 101-627 (the Fishery Conservation Amendments of 1990), November 28, 1990; Pub. L. 102-251, March 9, 1992; Pub. L. 102-523 (the International Dolphin Conservation Act of 1992), October 26, 1992; Pub. L. 102-582 (the High Seas Driftnet Fisheries Enforcement Act), November 2, 1992; and Pub. L. 102-587 (the Oceans Act of 1992), November 4, 1992.

2. The table of contents was amended by Pub. L. 100-711, Sec. 2(c), to insert new sections 114 and 115 and to redesignate former section 114 as section 116.

3. The table of contents was amended by Pub. L. 102-523, Sec. 2(b), and by Pub. L. 102-587. Each of these laws added a new title III to the Act. Please note that, pending further amendment, both titles (Global Moratorium to Prohibit Certain Tuna Harvesting Practices and Marine Mammal Health and Stranding Response) will be designated as title III. The first title III (Global Moratorium to Prohibit Certain Tuna Harvesting Practices) has been codified at 16 U.S.C. 1411-1418. The second title III (Marine Mammal Health and Stranding Response) has been codified at 16 U.S.C. 1421-1421h. To minimize any confusion, the corresponding United States Code citation has been included in the text of the Act next to any reference to title III or to sections 301-308.

4. Section 2(6) amended by Pub. L. 97-58, Sec. 1(b)(1).

5. Section 3(1) amended by Pub. L. 97-58, Sec. 1(b)(2). (The Pub. L. 97-58 amendment supersedes the previous amendment made by Pub. L. 93-205, Sec. 13(e)(1)).

6. Section 3(2) amended by Pub. L. 97-58, Sec. 1(b)(2).

7. Section (3)(5) was added and former paragraphs (5) through (14) were redesignated as paragraphs (6) through (15) by Pub. L. 102-582, Sec. 401(a). Note that a second definition of the term "intermediary nation" is set forth at section 3(17) of the Act.

8. The original section 3(8) was repealed by Pub. L. 97-58, Sec. 1(a). The original paragraphs (9) through (15) were redesignated as paragraphs (8) through (14) respectively by Pub. L. 97-58, Sec. 1(b)(2), but were again designated as paragraphs (9) through (15) by Pub. L. 102-582, Sec. 401(a). Current section 3(9) was amended by Pub. L. 97-58, Sec. 1(b)(2).

9. Section 3(12) amended by Pub. L. 102-587, Sec. 3004(b).

10. Section 3(15) amended by Pub. L. 97-58, Sec. 1(b)(2).

11. Section 3(15)(B) amended by Pub. L. 94-265, Sec. 404(a); effective date March 1, 1977, and section 3(15)(C) added by Pub. L. 102-251, Sec. 304.

12. Paragraphs (15), (16), and (17) added by Pub. L. 102-523, Sec. 2(c). Please note that, as enacted, two separate definitions have been designated as section 3(15). Also note that the term "intermediary nation," defined in section 3(17), is also defined in section 3(5) of the Act.

13. Section 101(a)(1) amended by Pub. L. 100-711, Sec. 5(c).

14. Section 101(a)(2) amended by Pub. L. 97-58, Sec. 2.

15. Section 101(a)(2) amended by Pub. L. 98-364, Sec. 101.

16. Section 101(a)(2)(B) amended by Pub. L. 100-711, Sec. 4(a)(2).

17. Subparagraphs (C) and (D) of section 101(a)(2) added by Pub. L. 100-711, Sec. 4(a)(3). Subparagraph (C) amended by Pub. L. 102-582, Sec. 401(b).

18. Section 101(a)(2)(E) added by Pub. L. 101-627, Sec. 901(g), and amended by Pub. L. 102-582, Sec. 103.

19. Section 101(a)(3)(B) amended by Pub. L. 97-58, Sec. 2 and by Pub. L. 100-711, Sec. 5(e)(1).).

20. Section 101(a)(5)(A) amended by Pub. L. 99-659, Sec. 411(a).

21. Paragraphs (4) and (5) added to section 101(a) by Pub. L. 97-58, Sec. 2.

22. Section 101(b) and (b)(1) amended by Pub. L. 97-58, Sec. 2.

23. Section 102(a) amended by Pub. L. 97-58, Sec. 3(a), by Pub. L. 100-711, Sec. 2(b), and by Pub. L. 102-587, Sec. 3004(a)(1).

24. Original paragraph (3) of section 102(a) struck, new paragraphs (3) and (4) added, and previous paragraph (4) redesignated as paragraph (5) by Pub. L. 97-58, Sec. 3(a).

25. Section 102(b)(3) amended by Pub. L. 97-58, Sec. 3(a). (The Pub. L. 97-58 amendment supersedes the previous amendment made by Pub. L. 93-205, Sec. 13(e)(3)).

26. Section 102(b) amended by Pub. L. 100-711, Sec. 5(b) and 5(e)(2).

27. As in original, probably intended to be "whether or not any marine mammals were in fact taken incidental to the catching of fish."

28. Section 102(d)(1) amended by Pub. L. 97-58, Sec. 3(a).

29. As in original, probably intended to be "species of whale incidental to commercial whaling...."

30. Section 102(f) added by Pub. L. 95-136, Sec. 4.

31. Section 104(c)(1) amended and paragraphs (2), (3), and (4) added by Pub. L. 100-711, Sec. 5(d).

32. As in original, probably intended to be "the authorized taking or importation;...."

33. Clauses (iv)-(ix) added to section 104(h)(2)(B) by Pub. L. 100-711, Sec. 4(d).

34. Section 104(h)(2)(A), (B), and (C) and Section 104(h)(3)(A), (B), (C), and (D) added by Pub. L. 98-364, Sec. 102.

35. Section 105(a)(1) amended and 105(a)(2) added by Pub. L. 97-58, Sec. 3(b).

36. "Director of the Office of Personnel Management" was substituted for "Civil Service Commission" in section 107(b) in accordance with Reorganization Plan No. 2 of 1978, Sec. 102.

37. As in original, probably intended to be "within thirty days...."

38. Section 108(a)(2) amended by Pub. L. 100-711, Sec. 4(b).

39. Section 108(c) added by Pub. L. 100-711, Sec. 4(c).

40. Section 109(b)(1)(E) amended by Pub. L. 100-711, Sec. 5(e)(3)(A).

41. Section 109(b)(3)(B)(ii) amended by Pub. L. 100-711, Sec. 5(e)(3)(B).

42. Section 109(h)(1) amended by Pub. L. 102-587, Sec. 3004(a)(2).

43. Section 109(h)(1), (2), and (3) redesignated as section 109(h)(1)(A), (B), and (C) respectively, section 109(h)(1) amended, and section 109(h)(2) and section 109(h)(3) added by Pub. L. 100-711, Sec. 5(a).

44. Subsections (c) and (d) of section 109 redesignated as subsections (k) and (l) respectively and original subsections (a) and (b) struck by Pub. L. 97-58, Sec. 4(a). Also, new subsections (a) through (j) added by Pub. L. 97-58, Sec. 4(a).

45. Section 109(l)(1) and (2) (formerly subsection (d)(1) and (2)) added by Pub. L. 95-316, Sec. 1.

46. Section 110(a)(1) amended by Pub. L. 97-58, Sec. 5

47. Section 110(a) redesignated as 110(a)(1) and paragraph (2) added by Pub. L. 100-711, Sec. 4(e).

48. Section 110(c) amended and paragraphs (1), (2), and (3) added by Pub. L. 95-136, Sec. 1.

49. Paragraphs (4), (5), and (6) added to section 110(c) by Pub. L. 95-316, Sec. 2.

50. Section 112(c) amended by Pub. L. 102-587, Sec. 3004(a)(3).

51. As in original, probably intended to be "with the purposes or policies...."

52. Section 112(d) amended by Pub. L. 96-470, title II, Sec. 201(e).

53. Section 114 added and former section 114 redesignated as section 116 by Pub. L. 100-711, Sec. 2(a).

54. As in original, probably intended to be "or is in the possession of the master...."

55. As in original, probably intended to be "Advisors," as used elsewhere in the Act.

56. As in original, probably intended to be "which is engaged in a fishery."

57. Section 115 added by Pub. L. 100-711, Sec. 3(a).

58. Former section 114 redesignated as section 116 by Pub. L. 100-711, Sec. 2(a)(1).

59. Section 116(a) was not enacted as part of the Marine Mammal Protection Act of 1972, but as section 7(a) of Pub. L. 97-58, superseding prior section 114(a). This section was amended by Pub. L. 98-364, title I, Sec. 104(1) and Pub. L. 100-711, Sec. 6(1).

60. Section 116(b) was not enacted as part of the Marine Mammal Protection Act of 1972, but as section 7(b) of Pub. L. 97-58, superseding prior section 114(b). This section was amended by Pub. L. 98-364, title I, Sec. 104(2) and Pub. L. 100-711, Sec. 6(2).

61. Section 117 added by Pub. L. 101-627, Sec. 901(a)-(f) and Sec. 901(h)-(j).

62. First sentence of section 201(b)(1) amended by Pub. L. 97-389, title II, Sec. 202.

63. Second sentence of section 201(b)(1) amended by Pub. L. 98-364, title I, Sec. 103(a).

64. Section 202(a)(2) amended by Pub. L. 100-711, Sec. 5(e)(4).

65. Section 202(a)(6) amended by Pub. L. 93-205, Sec. 13(e)(4).

66. Section 202(b) amended by Pub. L. 97-58, Sec. 6(1).

67. Section 206(3) amended by Pub. L. 97-58, Sec. 6(2).

68. Section 206(5) amended by Pub. L. 98-364, title I, Sec. 103(b).

69. Section 207 was not enacted as part of the Marine Mammal Protection Act of 1972, but as section 7(c) of Pub. L. 97-58, superseding prior section 207. This section was amended by Pub. L. 98-364, title I, Sec. 104(3) and Pub. L. 100-711, Sec. 6(3).

70. Title III (Global Moratorium to Prohibit Certain Tuna Harvesting Practices) added by Pub. L. 102-523, Sec. 2(a). It is codified at 16 U.S.C. 1411-1418. Please note that a second title III (Marine Mammal Health and Stranding Response) was enacted as part of Pub. L. 102-587. It is codified at 16 U.S.C. 1421-1421h. To minimize any confusion, the corresponding United States Code citation has been included in the text of the Act next to any reference to title III or sections 301-308.

71. Title III (Marine Mammal Health and Stranding Response) added by Pub. L. 102-587. Please see endnotes 3 and 70 for further explanation.

Excerpts from Congressional Reports Pertaining to the Marine Mammal Protection Act of 1972 As Amended

1972 **Public Law 92-522**
1. House of Representatives - Report 92-707
2. Senate - Report 92-863
3. Conference Committee - Report 92-1488

1977 **Public Law 95-136**
1. House of Representatives - Report 95-336
2. Senate - Report 95-177

1978 **Public Law 95-316**
1. House of Representatives - Report 95-1028
2. Senate - Report 95-888

1981 **Public Law 97-58**
1. House of Representatives - Report 97-228

1984 **Public Law 98-364**
1. House of Representatives - Report 98-758

1986 **Public Law 99-659**
Marine mammal provisions not addressed in reports

1988 **Public Law 100-711**
1. House of Representatives - Report 100-970
2. Senate - Report 100-592

1990 **Public Law 101-627**
1. House of Representatives - Report 101-579

1992 **Public Law 102-523**
1. House of Representatives - Report 102-746, Parts I and II

Public Law 102-582
1. House of Representatives - Report 102-262, Parts I and II

Public Law 102-587
1. House of Representatives - Report 102-758
2. Senate - Report 102-438

To improve the legibility of the excerpted Congressional reports, the reports from 1972 to 1988 have been re-typeset for inclusion in this publication. Every effort has been made to recreate the reports as accurately as possible. Before relying on any portion of these reports, however, reference should be made to the official committee reports. While it was not possible to keep every line intact, the pagination of the original reports has been retained. Typographical errors in the original reports have also been retained and are identified by addition of the term "[sic]".

Excerpts from the 1990 and subsequent reports are photocopies of the original committee reports and may be relied upon as such.

92D CONGRESS 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 92–707

MARINE MAMMAL PROTECTION ACT OF 1971

DECEMBER 4, 1971.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GARMATZ from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany H.R. 10420]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 10420) to protect marine mammals; to establish a Marine Mammal Commission; and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Marine Mammal Protection Act of 1971".

FINDINGS AND DECLARATION OF POLICY

SEC. 2. The Congress finds that—

(1) certain species and population stocks of marine mammals are, or may be, in danger of disappearance or depletion as a result of man's activities;

(2) such species and population stocks should not be permitted to diminish beyond the point at which they contribute effectively to the health and stability of the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish beyond the point at which they can maintain that equilibrium at which they may be managed on an optimum sustained yield basis. Further, measures should be immediately taken to replenish any species or population stock which has already diminished beyond that point;

(3) there is inadequate knowledge of the population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully;

(4) negotiations should be undertaken, as soon as possible, to encourage the development of international arrangements for research on, and conservation of, all marine mammals:

(5) marine mammals and marine mammal products either—

(A) move in interstate commerce, or

PURPOSE OF THE LEGISLATION

The purpose of this legislation is to prohibit the harassing, catching and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States, unless taken under the authority of a permit issued by an agency of the Executive Branch. The bill would also create an independent Commission to review the operation of the program and to recommend ways in which it might be improved.

LEGISLATIVE BACKGROUND

Recent history indicates that man's impact upon marine mammals has ranged from what might be termed malign neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and others, have only rarely benefitted from

our interest: they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.

Interest in the welfare of marine mammals is manifested throughout the world. Recent investigations into the intelligence of animals such as whales, porpoises and seals have spurred protests in Ottawa, New York, London, and Paris against their wanton killing. Groups have been formed with the express purpose of advocating stronger protective measures, and their memberships have mushroomed.

Some of these groups have been criticized as unrealistic: as failing to recognize that the principal significance of these animals lies in their usefulness to men and, by inference, that *any* use by man is therefore justifiable. This attitude, it seems to the committee, is no more realistic than that of those on the other end of the spectrum—that animals must be left alone altogether. Both fail to recognize that man's thumb is already on the balance of Nature, and that solicitous and decent treatment for the animals may well also be in the long-term best interests of man.

A number of bills have been introduced in the House dealing with the general subject of marine mammal protection. The bills on which most of the testimony was directed were essentially two: bills to create a flat prohibition against the taking or importing of these marine mammals, with a few relatively minor exceptions, introduced by Mr. Pryor and by a number of other Members. This group of bills was opposed by the Executive Branch as too restrictive and unworkable.

Messrs. Anderson of California, Pelly and others introduced H.R. 10420 as an alternative proposal, designed to give the Department of the Interior more flexible authority to permit the taking of marine mammals under circumstances which might be more closely controlled, and subject to public review and independent oversight by an independent Marine Mammal Commission.

Both measures were before the Committee when the Subcommittee on Fisheries and Wildlife Conservation began hearings on the legislation on September 9. In all, four days were devoted to hearings on the issue. Subsequent to the hearings and extensive executive sessions, the Committee unanimously ordered reported the Anderson-Pelly bill, H.R. 10420, with an amendment.

The Committee was impressed by the wide support for the principle of broader and more adequate protection for marine mammals, expressed by representatives of conservation and environmental organizations, humane groups, independent scientists, state agencies and agencies of the Federal Government and others. As reported, the Committee believes the bill satisfies the needs of the animals concerned, and meets the expressed concerns of virtually every witness on the question.

H.R. 10420 takes the strong position that marine mammals and the marine ecosystems upon which they depend for survival require additional protection from man's activities. There can be no question of the constitutional power of the Congress to regulate traffic in these animals and their products, deeply involved as they are in interstate and foreign commerce.

In essence, the bill gives to the Secretaries of Interior and Commerce the authority and direction to establish general limitations upon the taking of all marine mammals, and within those limitations, to issue permits for their taking. Criminal and civil penalties are prescribed for violations of the act, and the importation of marine mammals and their products will be subject to strict regulation. The public is assured of the right to be informed of actions taken or proposed to be taken by the Secretaries, and must be told of the evidence upon which the Secretaries propose to base their decisions.

Faced with the decision of the proper location of this program, the Committee elected to maintain the present division of authority between the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce, and the Department of the Interior. NOAA's involvement in marine mammals is derived from its subordinate agency, the National Marine Fisheries Service, formerly the Bureau of Commercial Fisheries. This agency has been assigned responsibilities for research and some management of cetaceans (whales, porpoises and dolphins), and seals, and H.R. 10420 assigns NOAA the continuing authority for the management and protection of such animals.

The other animals covered under the bill are walruses, sea otters, polar bears and manatees. The Department of the Interior presently has the authority that exists within the Federal government with respect to these animals, and will retain this authority under H.R. 10420. It might be added that the Committee is not satisfied that the jurisdictional split between agencies is helpful or useful; it retained the status quo largely upon the hope and expectation that a Department of Natural Resources would be shortly forthcoming, at which point the two programs would be merged into one. If such a Department is not created within the reasonably near future, the Committee is prepared to reexamine the question and to consider the virtues of consolidating the program within a single department.

Existing research and management programs within the Federal government dealing with marine mammals are quite small. Most of our present efforts are directed toward the Alaska fur seals, themselves the subjects of international treaties and supporting Federal legislation. HEW, the Department of the Navy and the National Science Foundation all have programs which affect marine mammals, and the present legislation does not touch upon these programs in any way. Interior and Commerce research and management programs for all other marine mammals have not exceeded $200,000 in the aggregate. H.R. 10420 would authorize the expenditure of $15.3 million over a five-year period in order to carry out the research and management responsibilities assigned to the management agencies, together with authority to engage in grant programs with the states; it would also authorize the sum of $5 million to the Marine Mammal Commission authorized to be created under Title II of the Act.

The Marine Mammal Commission would be a three-man group, with staggered three-year membership. Its primary function would be to review existing and proposed programs affecting marine mammals and to propose such changes to this program as may appear advisable. This Commission would be aided in its efforts by a nine-member Scientific Advisory Committee composed of members qualified to

review management and research programs and, if necessary, to carry out its own research.

Mindful of the temptation to use such a Commission as yet another bureaucracy, the Committee has taken the unusual step of recommending that its annual appropriations be restricted by permitting only up to one fourth of each year's appropriated funds to be used for operation and staffing of the Commission; the balance must be directed to developing the research deemed necessary by the Commission in order to carry out its responsibilities.

The Executive Branch of the government gave strong support to the principles of H.R. 10420, while recommending some revisions in specific language. To a large extent, the recommendations of these agencies were followed in the development of H.R. 10420 although those suggestions were not followed which the Committee felt would weaken the bill. The Committee did not feel, for example, that making the Commission a less independent agency would serve a useful purpose. Similarly, the Committee felt it to be of vital significance to include strong language exhorting the Department of State to develop more effective international treaties for the protection of these animals, which today have little or no protection.

In brief, the Committee feels that H.R. 10420, if enacted into law, would have the effect of placing the United States in the forefront of the development of effective meaningful measures for the protection of marine mammals.

Background and Need for This Legislation

Man has been involved with mammals of the sea since at least the beginning of recorded history, as sources of food, clothing and even of recreation. The dolphin was highly regarded in ancient Rome and there are even today parts of the world in which marine mammals are treated with reverence.

With few exceptions, this is not the case in the "civilized world."

Extensive hearings by the Subcommittee on Fisheries and Wildlife Conservation underscored the hazards and problems to which marine mammals are exposed today. Probably the most pervasive and threatening of these is the degradation of the environment upon which they depend. To some extent, this Committee has already begun to move to halt this degradation, in acting upon the Ocean Dumping bill (H.R. 9727) which recently passed the House. Ocean dumping is not, however, the only way in which marine ecosystems may be contaminated. Witnesses informed the Subcommittee that the incidence of pesticide and heavy metal contamination of the oceans seemed to be increasing, as indicated by biopsies on animals such as sea lions and sea otters. An additional problem is posed by man's increased take of fish stocks upon which these animals depend. The Alaska fur seals spend several months on and near their hauling grounds on the Pribilof Islands, and the females cannot venture far from their babies in order to feed themselves. Traditionally, the seal herd has depended upon an extensive Bering Sea herring population for food, and it appears that man's increasing herring fishing activities in the area may be presenting problems for the fur seals that they are poorly equipped to handle.

Still another problem to which marine mammals may be inadvertently exposed is the operation of high-speed boats. Manatees and sea otters have been crippled and killed by motorboats and at present the Federal government is essentially powerless to force these boats to slow down or to curtail their operations.

When to these hazards there is added the additional stress of deliberate taking, it becomes clear that many marine mammals may indeed be in urgent need of protection, such as would be available through passage of H.R. 10420. Man's taking alone, without these factors, might be tolerated by animal species or populations, but in conjunction with them, it could well prove to be the proverbial straw added to the camel's back.

Given the inadequacy of present knowledge, it is only conjecture—but a case might be made that the failure of some whale stocks to recover in spite of a worldwide ban on their taking which has existed for several years, may be due to just such a combination of factors as these. It is, of course, also possible that the failure of the blue and humpback whales to respond to the ban on their taking may be due to still other factors, not yet clearly identified.

In the teeth of this lack of knowledge of specific causes, and of the certain knowledge that these animals are almost all threatened in some way, it seems elementary common sense to the Committee that legislation should be adopted to require that we act conservatively—that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known. As far as could be done, we have endeavored to build such a conservative bias into the legislation here presented.

There was no division of opinion of testimony before the Committee that some legislation is required to provide additional protection and research authority to the executive branch with respect to marine mammals. There was considerable discussion as to the best means of bringing about an end that all considered desirable; the optimum protection of the marine mammals affected by the bill.

The hearings developed considerable information on the animals covered by the act. An extended discussion on these animals may be found at pp. 55–65 of the Committee hearings.

Very briefly, the bill covers all mammals who spend part or all of their lives in the sea. The largest category of animals covered also contains the largest members: the Cetaceans, or whales, including air-breathing dolphins and porpoises. U.S. citizens have never deliberately set out to kill these latter animals, although in recent years many have been caught by U.S. fishermen as an inadvertent consequence of commercial fishing for tuna with purse seines. It appears that many porpoises caught by tuna nets have been killed in the past—general estimates vary from 200 to 400 thousand per year. They have been killed because they panicked when surrounded by the tuna nets and have attempted to escape by diving; diving, they have then become entangled and drowned.

Commercial fishermen testified that they have gone to considerable lengths to permit porpoises to escape unharmed, occasionally jumping into the water themselves to untangle the trapped animals. More recently, new techniques have been developed involving smaller

mesh nets, and the industry is hopeful that the excessive kills of the past will now be stopped. The Committee took pains in its consideration of this bill to see that the legitimate needs of the tuna industry were not ignored, while accepting the clear requirement that porpoises be given every reasonable protection.

Another large category of animals covered under this legislation is seals, many species of which are hunted and killed for their skins. There has been great public concern and indignation over the annual seal "hunt" off the Canadian coast, where thousands of baby harp seals have been killed each Spring, at less than a week old. Witnesses urged the Committee to establish an absolute ban on the U.S. import of skins from these animals, and the bill provides such a ban. Although it does not appear that the U.S. market is a significant portion of the world market for harp seal skins, to the extent that any of these skins are presently sold in this country the Committee was of the opinion that it should stop.

There was much testimony on the conduct of the Alaska fur seal program. Here the evidence is persuasive that, by and large, the program has operated to the advantage of the fur seal herd. As a result of uncontrolled killing by citizens of many nations in the last century, the world population of fur seals declined from several million to approximately 200,000 members. Accordingly, the United States, Japan, Great Britain (later Canada) and Russia developed a treaty in 1911 to regulate the taking of fur seals. As a result of this treaty, the herd has increased to a level of some 1.3 to 1.5 million, under what is generally considered to be a policy of enlightened and effective management.

This is not to say that the fur seal herd is free from problems. It appears that these numbers are not growing as fast as they should be, given the current permitted level of taking, and the reasons for this failure to increase are not clear. But it is also true that our level of knowledge and relatively benign management is far superior to that which presently exists with respect to all other species of marine mammals.

U.S. knowledge and research programs devoted to the rest of the seals, including the sea lions and the walruses, is tiny—as have been our efforts to control significantly the activities of man affecting these animals. The management activities that have taken place to date have been almost exclusively handled by the states. Many of these state programs are soundly based, and should be encouraged. Other state management programs involved the payment of bounties on marine mammals of various types. There is, in brief, little semblance of any sort of integrated rational program for management of all marine mammals within the United States; given the divided nature of the regulatory structure which affects them, this is scarcely surprising.

The only American stocks of walruses are found off the Alaska coast in the Bering Sea. Walruses are not significantly taken by U.S. citizens other than Eskimos, although they are not thereby assured of protection. There are no hard figures, either of the size of the walrus herd, or of the extent of native taking. The most commonly used hunting technique, according to the evidence before the Committee, is for groups of Eskimos to float down upon a number of walruses on ice floes, and then to fire indiscriminately into the herd. Those

walruses which escape into the sea are lost, while those who remain dead or immobile are taken. It also appears that the principal, or at least a principal, purpose of walrus hunting today is for their ivory tusks. Walrus meat had previously constituted a staple commodity for the Eskimos as a source of food for their dog teams, but since the dog teams have largely been replaced by snowmobiles, this incentive for killing has almost disappeared.

Sea otters are also covered by this legislation. Formerly hunted to a point of virtual extinction, the sea otters recovered after the slaughter was terminated as commercially impracticable, shortly after the close of the nineteenth century. The sea otter has recovered, and is now found in populations in the Aleutians, chiefly in the neighborhood of Amchitka Island, and in Southern California waters. It appears that pressures are beginning to build up for the commercial harvest of these animals, and so this need for more adequate protection becomes more pressing.

From every indication, the polar bear has reached a point where the additional protection which would be provided by H.R. 10420 has become almost essential. There is a scholarly dispute on the question of whether there are one or more subspecies of polar bears, but the uncontroverted testimony before the Committee is that the Alaskan members of the species are becoming scarcer. The major reason for this decline in numbers may be the method of hunting presently employed by Alaskan and other trophy hunters—this involves hunting by airplane and has developed into a highly efficient method of reducing the Alaskan polar bear population.

There are little hard data on the effect of this type of hunting, but it does appear that the bears killed are becoming increasingly younger—this, in turn, indicates that the hunters may be cutting deeply into the breeding stock of these animals. If so, the end may not be far away.

The Soviet Union has been attempting for years to have the United States and other circumpolar nations halt their hunting activities, and to declare a ban on the hunting of polar bears. The United States has resisted these overtures, chiefly on the basis that we did not yet have sufficient information to tell just what was happening to the bears. For the same reasons, we have also declined to put the bears on the endangered species list, pursuant to the Endangered Species Act. While this Committee is not in agreement with either this philosophy or this reading of the Act, it is not necessary to develop this issue further at this time since enactment of this bill will put the bears under more stringent federal protection and will clearly result in a de facto prohibition of trophy hunting for sufficient time for the bears to develop out of the depleted state in which they now exist.

The other principal category of animals covered by the bill is the Sirenians, the American members of which order are Florida manatees. These animals are protected from hunting by state law, although the testimony before the Committee indicated that the animals are still exposed to serious hazards. These hazards are principally a) the operation of powerboats in areas where the manatees are found, and b) the excessive use of herbicides in areas draining into these waters, which in turn destroys the habitat and food supply of the manatees. While H.R. 10420 would provide the Secretary of the Interior with adequate

authority to regulate or even to forbid the use of.powerboats in waters where manatees are found, the Committee did not feel that matters had yet reached the state where additional authority would be required to allow the Secretary to forbid the use of herbicides, when used with ordinary care and prudence. The definition of taking, however, includes the concept of harassment, and it is intended that this term be construed sufficiently broadly to allow the regulation of excessive or wanton use of these chemical compounds, as well as the operation of powerboats.

As approved by the Committee, the bill involves a number of basic concepts and techniques:

1. Before any marine mammal may be taken, the appropriate Secretary must first establish general limitations on the taking, and must issue a permit which would allow that taking. In every case, the burden is placed upon those seeking permits to show that the taking should be allowed and will not work to the disadvantage of the species or stock of animals involved. If that burden is not carried—and it is by no means a light burden—the permit may not be issued. The effect of this set of requirements is to insist that the management of the animal populations be carried out with the interests of the animals as the prime consideration.

2. The bill creates a strong regulatory responsibility in the agencies involved, coupled with a Congressional directive that far more adequate knowledge must be developed on what is actually happening to these animals.

3. The public is invited and encouraged to participate fully in the agency decision-making process. The agencies are further required to provide full information to interested members of the public on what the implications of the program and of any proposed agency actions may be.

4. The bill permits and indeed requires the development of an extensive management program in the agencies concerned, with full opportunity for cooperative federal-state management programs designed to carry out the purposes and policies of the act. There is no intention or desire within the Committee to remove any incentive from the states to carry out necessary research or to protect animals residing within their jurisdictions; in point of fact, the bill gives authority to the Secretaries to develop grant programs to further the objectives of the legislation, within broad federal guidelines.

5. The bill creates an independent Marine Mammal Commission, to be aided by a scientific advisory body, charged with responsibility for reviewing existing national and international programs affecting marine mammals, and given the authority to make recommendations to the responsible officials on ways in which those programs may be made more consistent with the purposes and policies of the Act.

6. The bill puts a strong injunction on the Department of State, which has not yet visibly taken an interest in more adequate protection for marine mammals, to begin to develop new arrangements for protection of these animals and of ocean ecosystems that are significant to their welfare; it also sets dates by which action must be taken in this regard. Should these dates not be met, the Committee reserves the option of developing new and less discretionary methods of reaching these objectives.

7. The bill provides wide authority and direction to the appropriate Secretaries to restrict or to prohibit the importation of marine mammals or animals taken by methods or in circumstances which would not be permitted to persons subject to U.S. jurisdiction.

8. The bill establishes reasonable protection for Alaskan natives taking marine mammals for purposes of food or clothing, where the primary purpose is not commercial sale. It couples this protection with adequate tools to allow the Secretaries to prevent abuse of these privileges or to limit the taking in order to protect endangered or depleted species or stocks.

In adapting the bill to the circumstances involved in the present taking of marine mammals, the Committee gave careful consideration to alternative legislation urged upon it by dedicated and sincere individuals and groups which would have provided a flat prohibition against the taking or importing of marine mammals, with a few relatively minor exceptions. The first day of hearings was dedicated almost exclusively to testimony from such individuals and groups endorsing the alternative proposal.

While the basic premises underlying this legislation are certainly appealing, on close examination of the issue the Committee simply found itself unable to accept the thesis that a flat ban would inevitably operate to the benefit of the animals concerned. Experienced, independent scientists, not representing hunters, entrepreneurs or other interest groups, argued persuasively that animal populations may indeed require management in order to prevent them from exceeding the carrying capacity of their environment and thus destroying it and themselves in the process. "Nature's way" of regulating animal populations is very often less humane than man's way.

The scientists made the point that man's thumb is already on the balance of nature and that to remove it altogether might be far more cruel and damaging than would be the effects of a responsible management program. Witnesses called to the attention of the Committee the situation in the British-held Farne Islands, where a strict "hands-off" policy has resulted in thousands of starving and disease-ridden seals. And it is unfortunately a fact of life that the class of animals which suffers the most in these circumstances is the young.

In these circumstances the Committee simply could not accept the philosophy that inaction in the circumstances is the best policy. Granted that our level of knowledge of these animals is in almost every case minimal, and that management action in the past with respect to many animal species has resulted in mismanagement—such as the federal predator control program—it is nonetheless the strong feeling of the Committee that the answers to these problems lie not in abolition of the concept of management, but rather in making the management that does take place more responsive to the true needs of the situation.

It is for this reason that the Committee endorsed the concept of wide public review of the activities of the federal management agencies, coupled with the creation of an independent Marine Mammal Commission charged with responsibility for reviewing the manage-

ment activities. Abuses by the federal managers, if any, will be highly visible, both to the public in general and to the Commission. They will also be visible to this Committee, which proposes to maintain vigilant oversight on the program to see that it fulfills the high expectations of the Congress in bringing this program into existence.

It is undeniable that the levels of knowledge of scientists on marine mammals are very low. The situation must be changed, and H.R. 10420 provides a vehicle for doing so. It is not contemplated that the research authority provided to the Secretaries or to the Marine Mammal Commission will replace or supplant existing research authority in other organizations, such as the National Science Foundation, the U.S. Navy, or others. What is intended is that the research programs should be integrated and coordinated to the maximum extent possible consistent with their several purposes.

The programs contemplated by this bill are not long in duration, at least at their inception. The Committee feels that the five year period for which authorizations have been provided is sufficiently long to enable the development of adequate scientific programs, but not so long as to give the agencies what amounts to a blank check upon the Federal treasury. We do need more information if we are adequately to discharge our responsibilities to the animals affected, and this bill provides the vehicle for the beginning of our efforts to obtain that knowledge.

A sincere effort was made in the Committee deliberations to amend the bill by providing a two-year moratorium on the taking of most categories of marine mammals. The proposal was rejected, not because the Committee was unsympathetic with its objectives, but rather because it was felt that the situation of the animals demanded a more flexible means of handling problems that may arise. As a practical matter, with regard to practically all of the species and stocks involved, there will exist a *de facto* moratorium for at least two years, and very probably longer. The reasoning underlying this conclusion depends upon a number of elements of the bill:

1. the requirement that no marine mammal may be taken without a permit [Sec. 101 (a)];
2. the fact that no permit may be issued until the appropriate Secretary has issued appropriate limitations [Sec. 103 (b)];
3. the fact that such limitations must be based upon scientific evidence, and must be issued to insure that any taking is not to the disadvantage of the species or stock, and is consistent with the purposes and policies of the Act [Sec. 102(a)];
4. the fact that, with respect to almost every species and stock of animals today, there is little evidence to indicate what should be done one way or the other, and that the development of this evidence will take time—in most cases more than two years.

There is information on a number of these animals which will support fairly prompt activity on the part of the Secretary. The Alaska fur seal has been the subject of extended inquiry for years, and while more could and should be known, certainly enough is known at this date to support the development of a working permit program.

As to the question of the stocks of porpoises currently taken, and for the most part released by the commercial tuna fleet, it is the feeling of

the Committee that there is little information today and that a great deal must be learned. It is the expectation of the Committee that the Secretary of Commerce will continue his current research efforts in cooperation with the fishing industry into more effective techniques for catching tuna which involve lessened hazards for the porpoises who are caught as an incident to their operations. At the current time, it appears to the Committee that the tuna fleet would be an appropriate recipient of general permits, under the authority of Section 103(i) of Title I, keyed not to specific numbers of porpoises which might be taken but to the techniques that should be used in fishing operations. Certainly no one can disagree that the best available techniques should be used, in order to avoid or minimize damage to porpoises, and to its credit, the tuna industry has given every indication of its willingness to cooperate to achieve this objective. It is the Committee's view that the language of the bill will encourage the industry and the agencies of government to work together, and will impose no barriers to that work. If these expectations are not met, the Committee is prepared to take the necessary steps to see that they will be met.

In its deliberations, the Committee gave careful thought to the possibility of imposing restrictions upon U.S. citizens and companies engaging in activities in foreign countries which would not be permitted to them in the United States. This was done as the result of suggestions made during the course of the hearings which indicated that there might be significant U.S. investments in companies taking animals from depleted or endangered species or stocks. Ultimately, the decision was made not to include the authority to require the repatriation of funds used for this purpose, largely on the basis that there was no solid information available on which a judgement might be made. The matter does continue to be of considerable interest, however, and it is the expectation of the Committee that the affected Departments of the government and the Marine Mammal Commission will look into this question and will report back on the need for legislation to plug what may or may not be a loophole in H.R. 10420.

SECTION-BY-SECTION ANALYSIS

Short Title

SEC. 1. The Act may be cited as the "Marine Mammal Protection Act of 1971".

Findings and Declaration of Policy

SEC. 2. (1) This subsection makes the point that certain species and stocks of marine mammals may be threatened with depletion or extinction by man's uncontrolled activities.

(2) This subsection stresses the value and importance of marine mammals to the ecological stability of the oceans and makes the point that these animals should never be permitted to diminish beyond the point where they constitute a functioning element of marine ecosystems; if they do go below this point, efforts should be made to increase the stocks.

(3) This subsection states that not enough is known about virtually every species and stock of marine mammals and that more knowledge is essential.

(4) This subsection urges prompt negotiations for the development of more adequate international treaties for the protection of marine mammals.

(5) This subsection states that Congress has a legitimate interest in acting in this area since the animals are highly significant to interstate commerce.

(6) This subsection states that marine mammals are resources of great significance and that it is congressional policy that they should be protected and encouraged to develop consistent with sound policies of resource management. The primary objective of this management must be to maintain the health and stability of the marine ecosystem; this in turn indicates that the animals must be managed for their benefit and not for the benefit of commercial exploitation.

Definitions

SEC. 3. This section defines the various terms used in the bill.

(1) "Depletion" or "depleted" refers to the situation in which species or stocks of animals have declined significantly or have reached a point at which their future may be in jeopardy. The concept is broader than that of "endangered species" within the meaning of the Endangered Species Conservation Act of 1969. It provides the Secretaries of Interior and Commerce with authority to step in to protect animals from species and stocks which have declined significantly before they have become formally endangered or actually extinct.

(2)"District Court of the United States" means the various U.S. District Courts.

(3) "Humane" in the context of taking marine mammals means the method of taking which involves the least possible amount of pain and suffering which can be inflicted upon the animals involved. It is not a simple concept and involves factors such as minimizing trauma to groups of highly intelligent, social animals such as whales and porpoises where the taking of any member may be distressing to the group. In many cases, where an animal may not be taken humanely the bill will prevent that animal from being taken at all.

(4) "Marine mammals" means mammals which are physiologically adapted to the oceans, such as sirenians (manatees and sea cows), cetaceans (whales, porpoises, and air breathing dolphins) and pinnipeds (seals, sea lions, walruses and others). The term also includes animals such as polar bears which are adapted to an intermittent land-sea environment. For the purpose of the Act, the term includes parts of marine mammals, including but not limited to their fur and skins.

(5) "Marine mammal product" means processed or unprocessed merchandise made from marine mammals.

(6) "Optimum sustained yield" means a sustained yield resulting in an optimum, usually close to maximum, number of animals, bearing in mind the primary goal of ecosystem health and productivity.

(7) "Person" means individuals, corporate entities, or employees of any government.

(8) "Population stock" involves a new concept, permitting and requiring the Secretaries to discriminate between different groups of animals distinguishable from other populations of the same species. The Alaskan polar bear, for example, is clearly a population stock within the general worldwide species classification for polar bears.

(9) "Secretary" within the context of this Act refers to the Secretaries of Interior or of Commerce, depending on the animals for which they are given responsibility. The Secretary of Commerce is given responsibility for all cetaceans and all pinnipeds, other than walruses; the Secretary of Interior is given responsibility for all other marine mammals.

(10) "Sustained yield" means that point in which the animal recruitment to animal population equals the annual taking from that population.

(11) "Take" is defined broadly by the Act, as including harassing, hunting, capturing, or killing any marine mammal or attempting to do so. The act of taking need not be intentional: the operation of motor boats in waters in which these animals are found can clearly constitute harassment.

(12) "United States" includes all lands over which the United States government has jurisdiction.

(13) "Waters under the jurisdiction of the United States" means waters out to the twelve mile limit.

TITLE I —CONSERVATION AND PROTECTION OF MARINE MAMMALS

Prohibitions

SEC. 101. (a) This section states that it is unlawful, without a permit or an exception as provided by Section 107 of the Act, for any person or vessel subject to the jurisdiction of the United States to take any marine mammal on the high seas or for any person or vessel, or other conveyance (such as an airplane) to take any marine mammal on waters or lands under the jurisdiction of the United States unless expressly provided for by an existing international agreement. The only such agreement of which this Committee is aware is a treaty between the United States and Japan referred to in the Department of State's comments on this legislation.

It is also unlawful for any person to use any port, harbor, or other place under the jurisdiction of the United States in any way connected with a prohibited act unless a permit has been obtained or the exceptions in Section 107 are applicable. The section further prohibits any person subject to United States jurisdiction from processing, transporting or attempting to sell any marine mammal taken unlawfully.

(b) This subsection makes it illegal to import any marine mammal within certain specified categories unless that mammal is imported for legitimate scientific research. These animals may not be imported for any commercial purposes. The categories are those animals which are (1) pregnant when taken, (2) nursing (either parent or young), or less than eight months old, whichever occurs later, (3) taken from a species or stock which has been designated by the appropriate Secretary as depleted or endangered or (4) taken inhumanely.

This section will bar the import of skins taken from the baby Canadian harp seal, the slaughter of which has occasioned considerable and, in the opinion of the Committee, justified public criticism in recent years. It will also prevent capture of animals such as whales and porpoises, who are occasionally caught by capturing the baby in order to take the mother.

(c) This subsection poses an absolute and permanent ban on the importation of animals taken in violation of any law, of marine mammal products from such animals, or of marine mammals which may not be sold in their country of origin. It also prohibits the importing of fish caught outside of the United States where the fish were caught by techniques which the Secretary concludes are injurious to marine mammals. Fleets of tuna fishermen already catch tuna fish by catching porpoises in the process. This section will prohibit the importation of any tuna caught by this method once the Secretary has been informed that porpoises are being taken by methods which are deemed unreasonably injurious to those porpoises. If foreign fleets elect to continue to catch tuna fish by these methods, this section will close the United States market to the tuna fish caught in this fashion.

(d) This subsection limits the impact of the subsections banning importations to articles imported after this Act becomes operative and after the effective date of the events which make their importation illegal. It will serve to protect those with inventories of products at the time these actions become unlawful.

Limitations on Taking of Marine Mammals

Sec. 102. (a) This section establishes the basic, underlying theme of this Act. It states that the Secretaries of Interior and Commerce, once it is determined on the basis of scientific evidence that there is a need for such limitations, shall issue limitations on the taking of marine mammals to insure that such taking does not occur to the disadvantage of the species or stocks from which the animals are taken and that such taking would be consistent with the policies of the Act. It requires, in effect, that limitations be established which will be designed to act for the benefit of the animals in question. While clearly it is not to the benefit of an individual animal to be taken, the Committee was persuaded by overwhelming scientific evidence that there are, in fact, cases in which animal species or stocks may be benefited by removing excess members. In these cases, the Secretary will establish appropriate limitations which will permit the taking of these animals.

(b) This subsection lists the general criteria which may be considered by the Secretary in the process of prescribing limitations under the Act. These include a wide range of factors such as the effect of limitations on present and future animal populations. U.S. treaty requirements, ecological and environmental considerations, the conservation and development of fishery resources and economic and technological feasibility.

The Secretary, for example, in regulating the operations of the tuna industry with respect to the catching of porpoises must consider the technical capability of these fishermen to avoid injury to porpoises. It is not the intention of the Committee to shut down or significantly to curtail the activities of the tuna fleet so long as he is satisfied that the tuna fishermen are using the best available technology to assure minimal hazards to marine mammal populations.

(c) The limitations prescribed by the Secretary may include a number of factors: the number of animals to be taken, what animals may be taken, and when and where this taking may take place.

(d) This subsection requires the establishment of limitations to take place after full agency review open to public comment and hearing pursuant to the Administrative Procedure Act. In announcing

his proposed limitations, the Secretary is required to make available to the public a number of documents: (1) his statement of the size of the population affected, (2) his statement describing the impact of his proposed limitations, (3) the evidence on which he proposes to act, and (4) any studies or recommendations relating to these limitations. At this point in the development of the permit program, the public is given the right and the necessary information to participate, and if it considers such action appropriate, to protest against the establishment of these limitations.

(e) This subsection permits and requires the Secretary to revise limitations under the Act as deemed necessary.

Permits

Sec. 103 (a) This subsection allows the Secretary to issue permits authorizing the taking of any marine mammal. As already indicated, no one may take any marine mammal without such a permit, except natives in specified circumstances.

(b) This subsection requires permits issued under the authority of the Act to be consistent with the limitations prescribed in Sec. 102 and states that such permits must specify the various terms and conditions under which the animals may be taken. Wherever the reason for such taking is overpopulation, before issuing any such permit the Secretary must first consider the possibility of transporting excess members of this population to other areas which were formerly the habitat of such animals. It would, for example, require prior consideration to moving sea otters to any area within the Bering Sea or off the Pacific Coast before sea otters might be taken for commercial purposes.

(c) Scientific research permits or permits for the display of marine mammals by profit and non-profit institutions must be issued by the Secretary subject to his supervision of the manner in which those animals may be captured, transported and cared for. These permittees must also report to the Secretary when required to do so, on the ways in which these requirements have been carried out. If the Secretary is not satisfied with these activities or these reports, he may take appropriate action, which includes the revocation of permits and assessment of penalties.

(d) This subsection authorizes the Secretary to prescribe procedures to carry out his permit authority. It requires him to make public notice of permit applications received and to invite comments from interested members of the public. Permit applicants carry the burden of showing that the taking of marine mammals will be consistent with the purposes of this Act as indicated above and with the limitations established under Sec. 102. The failure to sustain this burden must result in the denial of a permit. The subsection authorizes the Secretary to grant public hearings upon request of any interested party, if the request is made on a timely basis. The Secretary is instructed to act in an expeditious fashion and to make full public disclosure of his action in issuing or denying a permit requested. The subsection also authorizes permit applicants to obtain judicial review under the Administrative Procedure Act.

(e) This subsection authorizes the Secretary to modify, suspend or revoke permits to make them consistent with revised limitations under Sec. 102, or where the permit has been violated. Such actions by the Secretary will take effect when the permittee is notified. The permittee

may then apply for prompt hearing and review by the Secretary. Notice of such modification, suspension or revocation must be published in the Federal Register.

(f) This subsection requires permits issued by the Secretary to be in the possession of the authorized person during the process of the authorized taking or at any other time incidental to that taking. The copy of the permit must be physically attached to any container in which the marine mammal is placed.

(g) The Act prescribes a sixty day period following the issuance of limitations under Sec. 102, during which no permit may be issued. This will allow the Secretary sufficient time to obtain all permit applications and to judge which should be granted rather than forcing him to act on a first-come, first-served basis.

(h) This subsection authorizes the Secretary to charge a fee for permits issued, related to the cost of the permit program.

(i) This subsection authorizes the Secretary to issue general permits under appropriate regulations covering the use of such permits. Fishermen, Eskimos, and others who may have a continuing problem may thus obtain general permits from the Secretary covering situations in which it is anticipated that permission is required, subject to those regulations which the Secretary considers consistent with the purposes and policies of the Act.

Penalties

Sec. 104. (a) This subsection authorizes the assessment of civil penalties by the appropriate Secretary for violation of the Act or permits or regulations issued under the Act, in the amount of not more than $10,000 for each violation. If the penalty is not paid, the Secretary is authorized to refer the matter to the Department of Justice for action.

(b) This subsection authorizes criminal action and fines up to $20,000 or up to one year imprisonment for any person who knowingly violates the Act or permits or regulations issued thereunder. The term "knowingly violates" is intended to refer to a conscious act or a conscious omission of the offender which amounts to a violation of the law, regulation, or permit. It does not require that the offender know that the Act which he consciously commits or omits constitutes a violation. Should a fine be assessed following a conviction resulting from information supplied by any person other than one who has the legal duty to report such an incident, the person or persons furnishing the information are entitled to receive one-half of the assessed fine, or $2,500, whichever is less.

Vessel Forfeiture

Sec. 105. This section makes vessels or other conveyances under U.S. jurisdiction subject to seizure and forfeiture when employed in any way in the unlawful taking of any marine mammal. Existing customs laws relating to seizure, forfeiture, and condemnation of vessels are applicable where appropriate.

Enforcement

Sec. 106. (a) The Secretaries of Interior or Commerce are charged with basic responsibilities for enforcement of Title I, except as otherwise provided. They may, however, utilize other federal agencies, such as the Coast Guard, for purposes of enforcement.

(b) The Secretaries are also authorized to designate state officers and employees as enforcement agents, although they are not so considered for purposes of federal employment laws.

(c) This subsection authorizes United States judges and magistrates to issue warrants or other process required for enforcement of the Act.

(d) The subsection authorizes appropriate officials to execute properly issued warrants or processes. It further authorizes those officials to arrest persons violating the law within their presence or view, with or without a warrant, and permits searches of vessels or conveyances with or without warrants with reasonable cause. Such officials may also seize vessels or other conveyances and appropriate additional equipment where such have been used in violation of the Act or reasonably appear to have been so used. Marine mammals taken in violation of the Act may also be seized and disposed of in accordance with appropriate regulations.

(e) This subsection requires the Secretary to expedite proceedings when a seizure has taken place. He is required to notify the owner or consignee of the seizure of these goods as soon as possible. Where appropriate, the Secretary may either hold marine mammals or products, or permit the person concerned to retain them after posting bond. After assessment of civil penalties, the subsection permits the Secretary to proceed against the marine mammals and products concerned and forfeited for appropriate disposition. The subsection requires marine mammals and products seized in connection with a criminal violation to be forfeited to the Secretary. It allows the forfeiture of property or other items taken in conjunction with the violation. Marine mammal products which have been seized must be returned to the owner or consignee, if (a) a civil penalty is assessed, but no action is taken to recover that penalty, or (b) if criminal action is unsuccessful and the Secretary has not thereafter commenced proceedings for the imposition of civil penalties.

Exceptions for Certain Natives

Sec. 107. (a) This section allows taking by Indians, Aleuts, or Eskimos dwelling on the coast of the North Pacific Ocean or the Arctic Ocean, under certain circumstances. These natives may not take marine mammals from endangered species, but they may take marine mammals without permits if the taking is for subsistence purposes in accordance with traditional customs, is not done wastefully, and is not done for purposes of direct or indirect commercial sale. If a native kills a walrus for subsistence purposes, the bill does not prohibit the use of ivory from that walrus' tusks so long as his primary purpose for taking was that of subsistence. If, on the other hand, an Eskimo wishes to take a number of walruses primarily for the purpose of selling their tusks, he may not do so without a permit.

(b) This subsection authorizes the Secretary, in cases where he determines that species or stocks of marine mammals require protection from native taking, to prescribe appropriate limitations upon this taking. It was recommended as an additional management tool by the State of Alaska. Once the need for such limitations has been removed, as for example, following the regrowth of a depleted stock, the limitations must be removed.

International Program

Sec. 108. This section requires the Secretaries of Interior and Commerce, acting through the Secretary of State, to: (1) encourage the development of international laws and treaties for the protection of specific regions significant to marine mammals, such as the Antarctic Ocean and the Bering Sea, (2) encourage the strengthening of existing treaties which relate to marine mammals in order to make them consistent with the purposes of this Title. (An obvious case in point is the International Whaling Treaty which was entered into not for the benefit of the whales, but for the benefit of the companies exploiting them. This inadequate measure should clearly be strengthened.) (3) seek an international meeting, not later than June 1, 1973, for the purpose of signing international treaties for the protection of marine mammals, and implementing subparagraph (2) of the section, and (4) provide a full report to the Congress within a year of enactment of this Act on the results of efforts undertaken pursuant to this section.

Federal Preemption; Cooperation with States

Sec. 109. (a) This subsection preempts state laws and regulations relating to the taking of marine mammals, except as provided in subsection (b).

(b) This subsection authorizes the Secretary to develop effective working cooperative arrangements with state agencies and officials in order to carry out the purposes of this Act. It is not the intention of this Committee to foreclose effective state programs and protective measures such as sanctuaries; it is rather our intention to allow the development of a unified integrated system of management for the benefit of the animals and to encourage the states to take all actions which are consistent with this objective.

Marine Mammal Research Grants

Sec. 110. (a) This subsection authorizes the Secretary to make grants or to provide other appropriate financial assistance to state and other agencies in order to assist them in carrying out research on subjects relevant to the protection and management of marine mammals.

(b) This subsection authorizes the Secretary to make grants to states to enable them to develop programs for the protection of marine mammals which are consistent with the purposes and policies of this Title.

(c) This subsection authorizes the Secretary to establish such reasonable terms and conditions upon grants provided under the Act as may be deemed appropriate to protect the interests of the United States.

(d) This subsection authorizes, for the fiscal year in which the section takes effect and for the next four fiscal years, up to $500,000 each to the Secretaries of Interior and of Commerce, in order to carry out the purposes of this section of the Act. It appears to the Committee that this figure may well prove to be insufficient; as state and other agency research and administration programs are developed, implimented [sic] and expanded. If an increase in the authorization level proves necessary, the Committee is prepared to take appropriate steps.

Regulations; Administration

Sec. 111. (a) This subsection authorizes the Secretaries, in consultation with other appropriate federal agencies, if any, to adopt regulations to carry out the purposes of the Title.

(b) All federal agencies are authorized to cooperate on mutually agreeable terms with the Secretaries in carrying out the purposes of the Title.

(c) This subsection authorizes the Secretaries to enter into agreements, as necessary, with any person or agency of government in order to carry out the purpose of Title I of the Act.

(d) This subsection authorizes the Secretaries to review annually all programs in which the United States participates, involving the taking of marine mammals on land. If the U.S. activities are impaired by reason of a failure to own the necessary lands or interests therein, the Secretary must thereupon suspend the program and notify the Congress, recommending such additional legislation is deemed necessary.

Application to other Treaties and Conventions: Repeal

Sec. 112. This section makes it clear that the Act is to be applied as supplemental to and not in violation of existing international treaties or conventions which otherwise apply to marine mammals such as those applying to whaling and fur seals. It also repeals the proviso in the Act regarding the protection of sea lions in Alaskan waters.

Authorizations

Sec. 113. (a) This subsection authorizes an appropriation of $1.5 million for each of the five fiscal years after enactment of this Act to enable the Department of Commerce to carry out its responsibilities under Title I. This figure is consistent with budget estimates provided to the Congress by the Department of Commerce.

(b) This subsection authorizes the sum of $700,000 for the first year after the date of enactment of the Act, and $525,000 for the next four years, to enable the Department of the Interior to carry out its responsibilities under Title I. This is consistent with budget estimates submitted by that Department.

TITLE II—MARINE MAMMAL COMMISSION

Establishment of Commission

Sec. 201. (a) Establishes the Marine Mammal Commission.

(b) The commission is composed of three members serving three year staggered terms, appointed by the President from a list submitted by the Chairman of the Council on Environmental Quality, of individuals who are knowledgeable in the fields of marine ecology and research management and who are not then or will be thereafter in a position to benefit from the taking of marine mammals. The section bars existing government employees from service as a member of the Commission. Members of the Commission may not be reappointed unless serving as a replacement to fill a vacancy.

(c) The President shall designate the Chairman of the Commission from among the members.

(d) Members of the Commission shall be compensated on a daily rate equivalent of a GS–18 ($138.48 at this time) for each day the members are engaged in the actual performance of their duties. They are also entitled to reimbursement for travel expenses.

(e) The Title requires the appointment of an Executive Director who will be a full time employee of the Commission, paid at a rate not in excess of that established for a GS–18.

Duties of Commission

Sec. 202. (a) The Commission is required to do the following:

(1) Review existing federal laws and international treaties relating to marine mammals, including those dealing with whales and fur seals.

(2) Review existing information on the stocks of marine mammals and ways in which they may be managed consistent with the purposes of the Act and of the most humane possible ways of taking marine mammals; it shall also review the research programs carried out under the Act and all applications for research permits, authorized under Sec. 103.

(3) Carry out a [sic] necessary studies in connection with the protection and management of marine mammals.

(4) Recommend to the appropriate Secretary, and to other officials, such additional steps as it considers desirable in the interest of marine mammals.

(5) Recommend appropriate policies to the Secretary of State for strengthening existing international treaties and recommend additional measures for protection of marine mammals.

(6) Recommend to the Secretary of the Interior revisions to the Endangered Species List as they may affect marine mammals, and

(7) Recommend to the Secretary, other officials, and the Congress, measures deemed necessary or desirable to carry out the purposes of this Act, including those which it deems appropriate to protect Alaskan natives who may be adversely affected by the Act.

(b) The Commission is required to consult with the Secretaries at their request, and shall furnish its reports and recommendations before publication to them for comment.

(c) The Commission's reports and recommendations are specifically designated as public records, to be available to the public on reasonable terms and conditions. Other activities of the Commission are also matters of public record, subject to the provisions of the Freedom of Information Act.

(d) Where the Commission has made recommendations to federal officials, those officials must respond to those recommendations on a substantive basis within 120 days. Where those recommendations have not been followed or adopted, the appropriate official is required to return them to the Commission together with a detailed explanation of his reasons for his failure to follow these recommendations.

Committee of Scientific Advisors on Marine Mammals

Sec. 203. (a) This section authorizes and directs the establishment of a Scientific Committee of nine independent scientists knowledgeable in marine ecology and marine mammals affairs. The members of this Committee are to be appointed by the Chairman of the Commission, with the advice of the Director of the National Science Foundation, the Chairman of the National Academy of Sciences, and the Secretary of the Smithsonian Institution.

(b) The members of the Scientific Committee are to be compensated in like manner as the members of the Marine Mammal Commission.

(c) The Commission is required to consult with the Scientific Committee on studies and recommendations on research programs conducted under the authority of the Act and all applications for scientific research permits. Recommendations made by the Committee, or members of the Committee, to the Commission which are not adopted by the Commission must be transmitted to the appropriate federal agency and the Congress with an explanation of the Commission's reasons for not accepting such recommendations.

Commission Reports

SEC. 204. This section requires the Commission to transmit to the Congress an annual report describing its activities, including findings and recommendations by and to the Commission, together with the responses to those recommendations.

Coordination with other Federal Agencies

SEC. 205. This section authorizes the Commission to have access to all federal studies and data relating to marine mammals. It authorizes the Commission to utilize the facilities of federal agencies, under cooperative arrangements, and directs the Commission to take every feasible step to avoid duplication of research and to carry out the purposes of this Act.

Administration of Commission

SEC. 206. This section authorizes the Commission to do the necessary things in order to carry out its administrative responsibilities under the Act. Its financial and administrative services are to be provided by the General Services Administration and appropriate reimbursement made therefor.

Authorizations

SEC. 207. This section authorizes the sum of not to exceed $1 million for the fiscal year in which Title II is enacted, and for the next four fiscal years thereafter. Not more than one-fourth of the total amount of any sums appropriated to the Marine Mammal Commission pursuant to this Title shall be expended on activities other than research and studies conducted under the authority of 202(a) (2) and 3. This limitation was added to minimize the temptation on the part of the Commission to develop another paper-shuffling bureaucracy. It is the express intent of the Committee that the administrative activities of the Committee be held to a irreducible minimum; the Commission is expected to make every effort to see that its program is carried out accordingly.

SUPPLEMENTAL VIEWS OF CONGRESSMAN PETER N. KYROS

While H.R. 10420 constitutes a much-needed and unquestionably well-intentioned effort to preserve and protect the marine mammal population of the world, that effort ought to have been—and could reasonably have been—strengthened in at least two vital areas.

First and foremost, the sixty-day moratorium provided by the bill on the taking of marine mammals is insufficient, and should have been established for at least two years for the following good reasons:

(1) As the bill itself states, "The Congress finds that there is inadequate knowledge of the population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully." We simply do not know enough about these animal species, neither with regard to their levels of intelligence nor how useful they may be to man. More important, we do not know how many animals can be killed before we do irreparable damage to our ecological system; the risk is not worth the taking.

(2) Most, if not all, animal species need a chance to replenish their stocks. Man is fast making diminishing species out of almost all animals; for whatever purpose—whether scientific research or morality and humaneness—we might give these animal stocks the chance to replenish.

(3) The economic repercussions of a two-year moratorium could hardly be deemed serious. In view of the fact that we do not know what long-range harm we might be doing to our ecological system, the reasonable and conservative thing to do—in our own best interests—is to accelerate our research and study during a sufficiently lengthy period of time in which no further killing is permitted.

(4) Man's decimation of the environment is placing the animal world under great stress. We spoil our fresh waters with pollutants, and cover our foligae [sic] with pesticides which are then transported by birds to far-reaching areas—all with devastating effects upon the animal world. A moratorium would allow us to determine the specific effects of toxic and non-toxic pollutants on marine mammals. This would, of course, include not only living adult animals, but also their eggs or unborn young.

In short, exploitation of our marine mammals must first depend upon an adequate study of the living animals and their ecological relationships. Only then can sound management practices ensue.

The second area in which H.R. 10420 ought to have been strengthened is in the import restrictions and limitations it provides. While the bill establishes certain categories of endangered species or products therefrom which may not be imported into this country, I suggest that an across-the-board ban on importation, possession, or transportation of these animals or their products—except for scientific research under the expressed terms of the Act—would be both tenable and entirely legitimate.

The reasons for this are abundately [sic] clear. Again, we do not know enough about these animals and their place in the ecological system to sanction their excessive and unnecessary killing or use in this country. The word "unnecessary" is used advisedly—for there is no indication whatever that the products from any of these marine mammals are in any way needed by American citizens. Indeed, by discouraging the use of luxury furs from animals in danger of becoming extinct, the United States would have the opportunity of setting a precedent and example for the entire world. The issue here is simply humaneness, and it ought not to be overlooked.

In conclusion, I would like to commend our Chairman John D. Dingell of the Subcommittee on Fisheries and Wildlife Conservation, for exercising fairness throughout these long proceedings and patience in seeing that all viewpoints were heard from, and, indeed, for setting the entire framework whereby some of the things I have discussed here might be put into effect in the near future.

PETER KYROS.

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Calendar No. 824

92D CONGRESS
2d Session } SENATE { REPORT
No. 92-863

MARINE MAMMAL PROTECTION ACT OF 1972

JUNE 15, 1972.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, submitted the following

REPORT

together with

SUPPLEMENTAL INDIVIDUAL, AND MINORITY VIEWS

[To accompany S. 2871]

The Committee on Commerce, to which was referred the bill (S. 2871), to protect marine mammals; to establish a Marine Mammal Commission; and for other purposes, having considered the same, reports favorably thereon with an amendment in the form of a substitute and recommends that the bill as amended do pass.

PURPOSE

The purpose of this bill is to conserve and protect marine mammals by regulating activities of U.S. citizens and activities of all persons carried on within the jurisdiction of the United States. The principal mechanism is a permit system administered by the Secretary of the Interior or the Administrator of the National Oceanic and Atmospheric Administration of the Department of Commerce. The Marine Mammal Commission is created to assist in achieving this goal.

BACKGROUND AND NEED FOR NEW LEGISLATION

The committee has learned that man's dealings with marine mammals have in many areas resulted in over-utilization of this precious na-

tural resource. Many of the great whales which once populated the oceans now have dwindled to the edge of extinction and although they have been placed on the U.S. endangered species list, are still being hunted by other nations. Eight species of whales currently on the endangered list include the blue, gray, bowhead, right, fin, sei, and humpback, all of which are baleen whales; and the sperm whale, which is a toothed whale. The commercial hunting of whales has reduced these great mammals to the point that many may never be able to return to their original population size and balance in nature. Commercial whaling since 1948 has been under the jurisdiction of the International Whaling Commission. Much of the testimony heard by the Subcommittee on Oceans and Atmosphere indicated that the job being done by this Commission has been far from successful.

The porpoises and dolphins are small toothed whales. Few are taken deliberately at this time, but as many as 100,000 to 300,000 porpoises per year may have been killed by the U.S. tuna industry incidental to the catching of yellowfin tuna. The vessels of 12 nations, Bermuda, Cuba, Canada, Costa Rica, Ecuador, France, Japan, Mexico, Panama, Peru, Spain, and the United States, are involved in the porpoise-related, purse-seining of yellowfin tuna in the eastern tropical Pacific Ocean. Porpoises have drowned in the purse-seine nets because fishermen encircle the schools in order to capture the tuna which are associated with the porpoise. Because of expanding awareness of this problem, the industry has worked with scientists from the National Marine Fisheries Service to employ methods which reduce the hazard to the three species involved: spinners, spotters and white bellies. All of these aforementioned nations are members of the Inter-American Tropical Tuna Commission, but only the U.S.-flag vessels would be subject to domestic law to regulate the taking of tuna. Additionally, it is known that the Japanese are taking more than 50,000 porpoises annually for human consumption and are considering expanding this fishery.

The legislation also addresses itself to other marine mammals, including both fur seals and hair seals, the walrus, the sea otter, the polar bear, and the manatee. Hair seals, or the earless or true seals, are little utilized by U.S. citizens other than natives of Alaska. These include the harbor seal, the ring seal, the gray seal, the monk seal, Ross' seal, leopard seal, the hooded seal and the sea elephant. Few of these are considered endangered. The Department of the Interior does list the Caribbean monk seal as endangered, and it is probably extinct. The ribbon and Hawaiian monk seal are designated as "rare." The most well known of these species is the Canadian harp seal, which is the subject of an annual spring hunt by the Canadian and Norwegian governments. This year, the International Commission on the Northwest Atlantic Fisheries (ICNAF), in cooperation with the Canadian and Norwegian governments, reduced by nearly one-half the allowed taking of the harp seal, down to 150,000. The hunt was conducted between March 12 and April 24, 1972, and this committee was informed that 123,000 were actually taken, compared to 222,000 the year before. Harp seal pups are born on the ice flows on the Gulf of St. Lawrence, and is is the killing of these "Whitecoat" pups, from several days to several weeks of age, which has aroused public indignation. On January 18, 1972, the Canadian Ministry of Environment

received a report from the Canadian Committee on Seals and Sealing, which concluded that between 1950 and 1970 the stock of harp seals has been cut in half and that the trend toward decrease is continuing, and recommended a moratorium be established. However, no U.S. citizens participate in this hunt, and only a small proportion of the product of the Canadian hair seal industry does reach the U.S. market at this time.

The present estimate on the population of the walrus is around 100,000, all living in the Bering Sea. These animals appear to perform an important function because their methods of bottom feeding stir up valuable nutrients. Partly because of this, the Bering Sea is three to four times more productive than any other open ocean on the globe. There is no current agreement between nations on the taking of the walrus, and Russian vessels allegedly have been seen killing these mammals on the pack ice. Natives do take the walrus, and attempts have been made to begin sport hunting of walrus.

The eared seals include sea lions and fur seals. Although sea lions themselves are not commercially utilized to any significant extent by citizens of the United States, the fur seal population of the North Pacific Ocean is harvested annually. Estimates of the size of the fur seal herd have ranged from a low of several hundred thousand shortly after the turn of the century, when pelagic, or open ocean, sealing nearly wiped out the herd, to a present population estimated between 1.3 and 1.5 million. It has been the desirability of the dressed fur of the Alaska fur seal which made this animal subject to substantial over-commercialization in the period prior to 1911. History shows that one of the major incentives for the purchase of Alaska by the United States from Russia was the fur seal resource. Since 1911, there has been a treaty between the United States, the Soviet Union, Canada and Japan regulating the taking of fur seals and banning pelagic harvesting of these animals. It has been this treaty which is responsible for returning this herd to its present day size. The annual kill of fur seals takes place on St. Paul and St. George Islands in the Pribilof Islands of the Aleutian Chain and certain other Islands under the jurisdiction of the U.S.S.R. Since the fur seal is polygamous by nature, scientists maintain there is a number of bachelor males which can be taken annually without damaging the reproductive capacity of the herd.

A major reason for the controversy involved in this situation has been the method by which seals are killed. Crews of Aleuts separate and drive a number of bachelor males to a killing area each morning during the 6-week season. The killing is accomplished by striking the seals over the head with a long wooden club. Efforts are made to take only 3- and 4-year-old bachelor seals. Scientists and representatives of the government have maintained that the fur seal herd management program in the Pribilof Islands is one of the finest examples in the world of conservation of wildlife. The Fouke Fur Company of Greenville, S.C., has the sole contract on the processing of fur seal skins, because it is the only firm in the world which has the process capable of changing the raw fur seal pelt into a finished garment of high fashion beauty.

The Department of Commerce, National Oceanic and Atmospheric Administration, conducts the fur seal operation on the Pribilof Islands, providing the primary source of employment to the 600 persons who inhabit the islands. These native Aleuts are employed to kill the seals and perform preliminary treatment of the skins before their shipment to the mainland for final processing.

The polar bear is one of the marine mammals covered by this legislation which is considered to be the closest to endangerment. Its only natural predator is man and other bears, and it has been hunted for years by natives and by big game hunters. This legislation would complement Public Law 92–159, which the committee worked on in 1971, aimed at banning the hunting of wildlife from aircraft. Polar bears are found in Russia, the United States, Denmark (Greenland), Norway, and Canada. The committee received testimony which indicated for the first time that there are separate and distinct populations of bears off the Alaska coast and in the other Arctic nations as well. Although the committee received information that polar bear herds under the jurisdiction of the United States maintain a good rate of reproduction, testimony also indicated a decline in the size of the bears taken. Witnesses stated that the use of aircraft to hunt and harass these animals may have a direct impact upon the bear population. Bear cubs remain with their mothers approximately 2 years after birth and females breed every 3 years. When the State of Alaska recognized that the size and age of the bears being shot by hunters was going down, it instituted a permit system and reduced the kill. Russia, however, has banned the hunting of polar bears since 1956, claiming stocks have been depleted, and Norway plans to stop hunting of polar bears from vessels. Only natives are permitted to take bears in Greenland. Canada has a sophisticated management program dividing polar bear areas into regions and granting quotas to the villages of each region. Motorized vehicles are not allowed to be used in the hunting of polar bears in Canada. These nations have considered drafting an international treaty, which was first proposed by Russia. However, as of June, 1972, no action has been taken on this matter.

Once hunted almost to extinction, the sea otter has made a tremendous resurgence of population in California and Alaska waters. The southern sea otter, however, faces a definite threat to its health and safety from pollutants and increasing small craft traffic in the Monterey, Calif., area. Scientific studies have indicated a correlation between the high level of chlorinated hydrocarbons and heavy metals present in the tissues of many of these otters and a corresponding reduction in the reproductive rate.

With a total population that may number no more than 1,000 the future of the manatee in the United States is definitely in a precarious situation. Living members of the order Sirenia include three species of manatees and the dugong, all of which are dwindling and all of which are listed as rare or endangered by the International Union for the Conservation of Nature and Resources. An animal which once ranged from the coast of the Carolinas all the way to Texas, manatees are now found only in coastal waters around the Florida peninsula. These animals are also jeopardized by new forces—development, pollution, and watercraft.

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In an effort to determine the current status of various species and population stocks of marine mammals, the Committee on Commerce, Subcommittee on Oceans and Atmosphere, conducted five sessions of hearings in Washington and held additional hearings in Alaska, on May 13, 14, and 15. The Committee has determined that man's hand upon the environment has been severely heavy for some species of marine mammals. Polar bears have been rounded up by airplane to be shot by sportsmen. Whales have been hunted to the brink of extinction. Commercial fishermen have utilized the dolphin to catch certain species of tuna, to the detriment of the dolphin itself.

The only international agreement affecting any marine mammals under the jurisdiction of the United States is the North Pacific Fur Seal Convention. This treaty provides that seals may be taken only in their rookeries. The agreement provides 70 percent of the share of the operation on St. George and St. Paul islands to the United States and 15 percent each to Canada and Japan. Russia receives 70 percent of the seals taken on its islands, while Canada and Japan get 15 percent each. The present treaty does not expire until 1976.*

The committee has considered not only S. 2871, but H.R. 10420, the bill which passed the House of Representatives March 9, 1972, and a number of other Senate bills. These include S. 1315, introduced March 23, 1971, and S. 2579, introduced September 24, 1971, by Senator Fred Harris; S. 685 and S. 2639, introduced by Senator Bob Packwood of Oregon; Senator Ernest F. Hollings of South Carolina introduced S. 3112; and Senator Ted Stevens of Alaska introduced S. 3161 at the request of several wildlife groups.

The basic issue before the Committee was whether to ban outright the killing of any marine mammal under the jurisdiction of the United States, or whether the government should continue to allow supervised and restricted taking of certain mammals. No doubt, a sizeable segment of public opinion in the United States opposes the indiscriminate slaughter of marine mammals. But a strong body of evidence was presented to the committee that total and complete protection without scientific management is not necessarily the best answer to solving the problems of marine mammals. The committee has determined that the best answer to questions on the conservation of marine mammals must be the application of scientific principles and knowledge separately for each species of marine mammals. The committee believes it can justify the need for protection of the polar bear because there is evidence that the polar bear population has gone down steadily in recent years through increased game hunting, resulting in ever smaller "trophies" for hunters. On the other hand, the fur seal population in the Pribilofs seems to be holding its own. Complete protection of the fur seal would require abrogation of the Fur Seal Convention and a probable return to pelagic sealing by the Japanese, who have sought quota increases recently.

The Committee has asked our scientists about the populations of various marine mammals and a host of complex questions relating to their environmental health. In seeking answers, the committee found

*The Committee was pleased to note that the Secretary of Commerce on June 7, 1972, proposed making a fur seal sanctuary out of St. George Island for further study of fur seal population dynamics.

confusion between social decisions and scientific knowledge. A good example of the confusion is the matter of the fur seal. Some groups insist that the present population is only one-third of what it was 20 years ago, and that man's commercial exploitation is the cause for the alleged decline. The committee determined that previous high estimates of the fur seal population (appearing in a popular encyclopedia) were based upon population dynamics methods which are now considered completely erroneous. The committee has concluded that our knowledge of marine mammals is not nearly great enough for either proper conservation or commercial utilization as we have known it in the past. Additionally, it is found that an unfortunate argument has developed over the concepts of "protection" and "management." The committee, however, agrees with an eminent scientist who has explained, "man has already perturbed all of the earth's ecosystems and it is now our clear duty, as conservationists, to protect the future health of these ecosystems by managing them wisely at an international level."

General Description

The bill as reported by the committee would establish the following framework for protection and conservation of marine mammals:

There is created a 15-year moratorium to provide enough time for certain species of animals to reproduce and proceed through a life cycle without the threat of commercial or sport hunting.

There are certain important exceptions to this moratorium:

(1) The prohibitions of the Act do not apply to the taking or importation of mammals or marine mammal products pursuant to international agreements. Thus, no permit is necessary (and therefore the moratorium does not apply) for the taking of Alaska fur seals pursuant to the North Pacific Fur Seal Convention. Since this harvest of fur seals will be under the strict control and management of the National Oceanic and Atmospheric Administration and has as its goal the conservation of this species, the committee has determined that the permit system shall not apply.

(2) Permits are not required for commercial fishermen who take marine mammals incidental to their fishing operations during the 2-year research period provided in the Act. However, this is not to be interpreted as permission for the fishing industry to continue the unregulated killing of thousands of dolphins. To the contrary, it is the committee's intent that regulations be imposed as soon as practicable to minimize marine mammal fatalities through the use of currently available technology, which might include the Medina net with escape panel. Results of research in the yellowfin tuna fishery in 1972 show that with careful utilization of known technology, porpoise mortality can be significantly reduced. The committee is convinced that the industry will comply with strong Federal regulation and will cooperate with scientific research to find the safest practicable tuna fishing methods. After the 2-year research period, permits are required and are authorized to be issued in accordance with the Act. While it should be the goal of Congress and the Executive eventually to eliminate totally the killing of porpoises, present technology is not adequate to the task. Imposing a ban on incidental taking of porpoises would require the American tuna industry to scrap hundreds of millions of dollars of investment in purse-seining tuna clippers to return to uncompetitive, labor-intensive bait boat and long-line fishing. Since this is completely unrealistic, the industry, we are convinced, would shift from the American flag to a flag of convenience and simply avoid the regulations. Tuna is now a worldwide commodity. Loss of the American market would be a severe blow, but one which would not decrease fishing in the Southwest Pacific, and certainly more dolphins will be killed as more nations compete for fish.

(3) During the moratorium, the Secretary is granted authority, subject to procedures of the Act on hearings and judicial review, to make wildlife management decisions permitting exception to the moratorium when such decisions would be in accordance with the policy of the Act to preserve and conserve the animals involved. This authority would include the power to determiine [sic] that a State's laws on marine mammals could apply. The criterion which must be met in any decision to waive the moratorium, or to defer to State law, is that the principles of resource protection and conservation embodied in this Act must be maintained. Should a decision to make an exception to allow taking or importation pursuant to the Federal Act be made by the Secretary, then the sections of the Act on prohibitions, regulations and permits will apply. If a decision is made to defer to State law, then the provisions of State law will apply. In the case of importations, an additional requirement must be met; namely, that the mammal program of the country of origin must be consistent with the policies of the Act. If it is found not to be consistent, then the importation cannot be allowed for any purpose whatsoever. The whole concept of subsection (a) (3) (A) of section 101 is to give the Secretary leeway to act. Fifteen years is a long time, and there certainly will be instances when he will find it necessary, even helpful, to issue permits for taking or importation. An example might be permission for the importation of a marine mammal product, not specifically prohibited in section 102. The Secretary would have authority, working in consultation with the Marine Mammal Commission, to issue a permit for such importation. But, as mentioned before, the nation of origin would have to meet the stern test of conserving its marine mammals in a way consistent with the Act. Of course, any application for importation would be required to meet the tests prescribed in the prohibitions, regulation and permit sections of the Act, including judicial review and public participation.

Another example might be exercise of authority granted under section 109 to cooperate with States. The committee believes that in some cases, during the moratorium, states may be better equipped to conduct marine mammal management programs than the Federal Government. It is envisioned that the Secretary, upon making such a finding, could exercise his authority under this subsection to allow the States to enforce their laws if those laws are consistent with the Act or any rules issued by Federal authorities pursuant to this Act. Once this determination is made, the States would have to comply with the moratorium and all other sections as specified. But the granting of this authority would give the States authority, within their jurisdiction, to issue management decisions along the same lines as specified for Federal authorities.

(4) Additionally, during the moratorium, permits may be issued for the taking or importation of marine mammals for scientific research or

(5) for display in public or privately owned oceanariums. However, strict regulations are to be imposed by this legislation on such practices.

(6) Finally, the committee has, within certain limitations, exempted from the Act the taking of marine mammals by native Alaskan Eskimos, Aleuts and Indians. The Subcommittee on Oceans and Atmosphere conducted 3 days of exhaustive hearings in Alaska, taking testimony from more than 90 native villagers. The findings were that most villages of northern Alaska depend upon marine mammals not only for food, clothing and implements, but utilize products from seals, whales, and walruses as the basis for their small cash economy. An Eskimo hunter may bring in a seal, which is cut up for food, pelt and seal oil. Any excess beyond family needs can be sold to neighbors or turned in at a village store for credit on gasoline, fuel oil or ammunition. Carvings and native handmade crafts, and clothing, created from marine mammals, are a continuing manifestation of ancestoral cultural patterns, and must not be extinguished by act of Congress.

There is additional authority for the Secretary to exempt persons from the provisions of the Act for no more than 1 year from the date it takes effect. This concept comes directly from the Endangered Species Conservation Act and is aimed at preventing cases of undue economic hardship. A case in point could be an importer with a warehouse full of marine mammal products which would be banned from importation under the Act. Obviously, the committee does not intend economic ruin for anyone as the Act begins to take effect.

In addition to the special rules applicable during the moratorium, the bill authorizes and directs the Secretary and Administrator to establish general regulations on taking and importing by species of marine mammals, and to invite full public participation in this decision-making process.

Once these regulations are established and affirmed, should they be tested in court, permits then may be issued. However, the applicant must prove to the satisfaction of the Secretary or Administrator that the proposed action will not be inconsistent with the purposes and policies of the legislation.

In addition, the Departments of Commerce and Interior are directed to mount immediate research programs on marine mammals. As part of the research and regulatory responsibility, the agencies are authorized to work closely with states. Should any state adopt laws and regulations relating to individual species and these laws are found by the Secretary or Administrator to be consistent with the provisions of the Act, the State laws could prevail. There is no intention of the committee to provide unnecessary Federal preemption of State laws in cases where States are fully capable of carrying out aggressive enforcement procedures.

The committee was faced by the question of divided jurisdiction between the Department of the Interior and the Department of Commerce's National Oceanic and Atmospheric Administration. Considerable study was made of the job now being done by both Departments, and a decision was reached to maintain the division created under Reorganization Plan No. 4, which delegates to the Department of Commerce, all responsibility affecting the order Cetacea

(whales and porpoises) and the order Pinnipedia (seals), except walruses. All other marine mammals, including the walrus, sea otter, manatee, and polar bear, are delegated to the Secretary of the Interior. The argument was made to the committee that since the Department of Commerce is commercially oriented, all responsibility should be turned over to the Secretary of the Interior to enforce the provisions of the bill. The committee determined that the National Oceanic and Atmospheric Administration (NOAA) is the agency presently best equipped to deal with marine mammals on an ecosystem basis in the oceans. Virtually all the laboratories, experienced personnel and other facilities needed to deal with the marine mammals now under the Department of Commerce have been transferred to that Department. The Department of Interior is best equipped to deal with those mammals which maintain a close proximity to land, such as the walrus and polar bear. NOAA is a new agency. Its main purpose, as sanctioned by Congress in Reorganization Plan No. 4, was to consolidate, rationalize and thereby improve, the principal civilian Federal programs in the oceans and atmosphere (including conservation of living creatures, such as marine mammals). It has begun to create a strong environmental record for itself, and appears to be making progress toward fulfilling the goals set for it by Congress. To remove ocean mammals from its jurisdiction now is unwarranted and would undermine its whole purpose. Therefore, the committee has determined to retain the allocation of responsibilities between the two departments.

There are some advantages, of course, in placing all marine mammals under the aegis of a single agency which deals with the natural resources of the nation. President Nixon has proposed a Department of Natural Resources, but should such a department not become a reality within the reasonably near future, the committee is prepared to reexamine the issue of marine mammal jurisdiction along with the virtues of consolidation of the program under a single department.

The bill provides $4,500,000 annually for research. Typical areas of research may include Alaska; the Pacific Northwest and California, both of which have local mammals as well as fleets involved in the porpoise related tuna fishery; the eastern tropical Pacific high seas where the bulk of the tuna fisheries are located; the eastern Atlantic high seas area where there is a growing tuna fishery; and the New England area and Florida, which have small local populations of marine mammals. In addition, of course, whales occur throughout the global oceans. The committee believes that it has provided sufficient funds within this legislation to launch a marine mammal research program to gain sufficient knowledge to make intelligent conservation decisions. Knowledge gained from this research will ultimately be used to develop an overall understanding of ocean ecology. Any research program should include the following basic objectives specially referred to in section 112 of the Act: the incidental taking of certain species of porpoise in the tuna fishery must be reduced to the lowest level practicable, consistent with the latest and most competent technology that science can devise. The committee has authorized a $2 million, 2-year program to devise new methods of netting and tuna boat operating procedures which will reduce the killing of marine mammals. The committee has provided a 2-year period because it is

believed that science can come up with new systems within that time.

Additionally, our scientists might consider the overexploitation of the depleted stocks of large whales. This could include a detailed review of population dynamics of exploited whales as well as a program to monitor the abundance of all whales, including methods of defining stocks, biochemical analysis and use of other techniques such as satellites and sonar.

The United States needs increased knowledge of the distribution, range, numbers and biology of marine mammals in low abundance, including the Hawaiian monk seal, ribbon seal, Florida manatee, Guadaloupe fur seal, some whales and, in local areas, the gray and harp seals. (The Caribbean monk seal may already be extinct.) Additionally, there should be close observations of increasing reports of Soviet sealing and walrus killing expeditions in the Bering Sea. NOAA estimates that the Soviets and Alaskans are estimated to harvest 50,000 to 75,000 ice seals and about 4,000 walruses annually. And there are indications that the U.S.S.R. is constructing 23 new combination sealing-fishing vessels.

Contaminants are being concentrated in the flesh of marine mammals in increasing amounts. Premature birth among California sea lions has occured [sic] frequently with almost no survival among those pups which are born prematurely. Studies on nutrition and diseases of marine mammals should be carried out, including close study of pesticides and contaminant residues in tissues.

Basic life history and population information ought to be obtained for each marine mammal of concern to the United States. This should include all previously mentioned mammals as well as the small cetaceans, elephant seals, sea lions, harbor seals, Antarctic seals and sea otters. All of these animals are a part of the ocean biomass and are important in maintaining an ecological balance.

Finally, information should be obtained on marine mammals so that science can make an adequate interpretation of the entire marine environment to predict what will happen to marine mammals under different management programs and increasing utilization of marine resources by society and industry.

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The committee has proposed what it considers to be a strong international program affecting marine mammals. One of the major findings of the committee study is that unilateral action by the United States affecting any species or subspecies of marine mammal could be fruitless unless other nations involved in the taking of marine mammals work with the United States to preserve and protect these creatures. A good example of this is the involvement of the tuna industry with the porpoises in the Southwest Pacific. The use of the purse-seine method to catch tuna is expanding rapidly. France, Mexico, Spain, Japan, Canada, and Panama are building tuna clippers to take advantage of the improved technology and to compete in the world tuna market. Should the United States act alone in protecting porpoises there is nothing to indicate that other nations will follow suit. Therefore, the Act includes strong directives on international cooperation and coordination.

The Act also creates a Marine Mammal Commission, which will be a five-member group to review existing and proposed programs and

research affecting marine mammals. The Commission will be assisted by a nine-member Scientific Advisory Committee. Since the role of the Commission is consultative, it was determined that the amount specified for the Marine Mammal Commission should be no more than $500,000 per year, a fund sufficient to provide for the review of research, permits, and regulations as well as other items of concern to marine mammal protection and conservation. It was agreed that the Commission should not become a separate funding agency, and that research should be carried out by existing agencies and universities or other groups. It is believed, however, that the Commission itself can be a major source of assistance to the Government in identifying and solving the problems now faced by various species of marine mammals.

The committee considers that the adoption of this bill will place the United States in a position of world leadership in protection and conservation of marine mammals. The committee wishes to emphasize the need for international cooperation. The laudable but unilateral decision to place whales on the endangered species list has not resulted in significant reduction in the harvest of whales by the major whaling nations, Japan and the Soviet Union. Moreover, with sealing in the Antarctic a pending reality, even further communication and cooperation are needed between nations to prevent an increased slaughter of these animals for commercial purposes without a complete understanding of the population dynamics of those animals in that part of the world. It is believed that this legislation can provide a start to assure that future generations will be able to enjoy a world populated by all species of marine mammals.

SECTION-BY-SECTION ANALYSIS

Short Title

Section 1. The Act may be cited as the "Marine Mammal Protection Act of 1972".

Findings and Declaration of Policy

Sec. 2. (1) This subsection finds that certain species and stocks of marine mammals may be threatened with extinction or depletion by man's uncontrolled activities.

(2) This subsection stresses the value and importance of marine mammals to the stability of the ecosystem of which they are a part and provides that they should not be permitted to diminish below their optimum sustainable population. Emphasis is placed on the need to protect those geographic areas of significance for each species of marine mammals from adverse activities.

(3) This subsection states that not enough is known of the ecology and population dynamics of all marine mammals.

(4) This subsection finds that immediate negotiations should be undertaken to encourage the development of internatinal [sic] arrangements for research on and conservation of all marine mammals.

(5) This subsection indicates that marine mammals and their products either move in interstate commerce or affect the ecosystems of which they are a part in such a way as to affect other animals and products, and the protection and conservation of marine mammals is necessary to insure the continuing availability of such products which move in interstate commerce.

(6) This subsection states that marine mammals are resources of great significance and that it is Congressional policy that they should be protected and encouraged to develop to the greatest extent feasible, commensurated with sound policies of resource management. It is further stated that the primary objective of their management should be to achieve an optimum sustainable population keeping in mind the health and stability of the marine ecosystem, as well as the optimum carrying capacity of their habitat.

Definitions

Sec. 3. This section defines various terms used in the bill.

(1) "Depleted" means any case in which (i) a species or population stock is determined either to be threatened with extinction, or (ii) numbers have declined and the decline is continuing or is likely to continue, and as a result the species or stock would become threatened with extinction within the foreseeable future.

(2) "District court of the United States" means the various U.S. district courts.

(3) "Humane" in reference to the taking of marine mammals means that method of taking which involves the least possible degree of pain and suffering practicable to the animals involved.

(4) "Marine mammal" means mammals which are morphologically adapted to the marine environment. The term also includes animals such as polar bears which primarily inhabit the marine environment. The term also includes parts of marine mammals, including but not limited to their fur and skins.

(5) "Marine mammal product" means merchandise composed in whole or in part of marine mammals.

(6) "Optimum sustainable population" is defined as the number of animals which will result in the maximum productivity of the population or species when considered in the context of the health of the ecosystem of which the particular species or stock is a part, as well as the carrying capacity of the habitat.

(7) "Optimum carrying capacity" refers to the ability of a given habitat to support the optimum sustainable population of a species or stock without adversely affecting the ability of that habitat to continue that function.

(8) "Person" means a private individual or corporate entity or any employee of any government.

(9) "Population stock" or "stock" refers to a group of marine mammals of the same species that interbreed when mature. This concept permits a discrimination between different groups of animals distinguishable from other populations of the same species.

(10) "Secretary" within the context of this Act refers to the Secretary of the Interior or the Administrator of the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, depending on the animals for which they are given responsibility. The Administrator of NOAA is given responsibility for all cetaceans and all pinnipeds, other than walruses; the Secretary of Interior is given responsibility for all other marine mammals.

(11) "Moratorium" is defined as the cessation of the taking of marine mammals and a ban on the importation of marine mammals and their products.

(12) "Take" is defined as harassing, hunting, capturing, or killing any marine mammal or attempting to do so.

(13) "United States" includes all lands over which the U.S. Government has jurisdiction.

(14) "Waters under the jurisdiction of the United States" means waters out to the 12-mile limit.

(15) "Management" and "conservation" refer to the collection and application of biological information necessary to keep animals within a given species or population at the optimum carrying capacity of their habitat. The scope of this definition includes all those activities which are part of a modern scientific resource program. This term further includes, as appropriate, the periodic or total protection as well as regulated taking of any species or population.

TITLE I—CONSERVATION AND PROTECTION OF MARINE MAMMALS

Moratorium

Sec. 101. (a) (1) This subsection provides for a 15-year moratorium on the taking and importation of any marine mammal or marine mammal product subject to certain exceptions. These exceptions include provision for permits, which may be issued for the taking and importation of marine mammals or marine mammal products for purposes of display or scientific research during the moratorium under certain specific conditions;

(a) (2) provides another exception allowing the incidental taking of marine mammals in commercial fishing operations. This exception would apply to the killing of porpoises in the course of tuna fishing as well as killing of seals or sea lions when they interfere with salmon or other commercial fisheries. During the first 2 years after effectiveness of the Act, these takings would be governed by regulations issued under section 111. Thereafter, they would be permitted under the usual regulations and permit provisions of sections 103 and 104.

(a) (3) (A) grants additional authority to the Secretary, during the moratorium, to make decisions affecting marine mammals. It provides that the Secretary may permit exceptions to the moratorium when such exceptions would be in accordance with the policy of the Act to preserve and conserve the animals involved. The Secretary's authority would include the power to determine that a State's laws on marine mammals apply in lieu of the Act. The criterion which must be met in any decision to waive the moratorium or defer to State law is that the principles of resource protection and conservation embodied in the Act must be maintained. Should a decision to make an exception to allow taking or importation pursuant to the Federal Act be made, then the sections of the Act on prohibitions, regulations and permits will apply. (In the case of importation, an additional requirement must be met; namely, that the program for taking marine mammals in the country of origin must be consistent with the prohibitions and policies of the Act. If it is found not to be consistent, then the importation cannot be allowed for any purpose.) If a decision is made to defer to State law, then the provisions of that law will apply; provided, of course, that the State law has been found to comply with the Act and continues to do so.

(a) (3) (B) provides that during the moratorium, except for research purposes indicated in subparagraph 101 (a) (1), no permit may be issued for the taking of any marine mammal classified as an endangered species or as depleted, and additionally no importation may be made of any such marine mammal.

(b) This subsection excepts from the moratorium and other provisions of this Act the taking of marine mammals by native Alaskan Eskimos, Indians or Aleuts who live on the coast of the North Pacific or the Arctic Ocean, but only if the taking (1) is for subsistence purposes by natives living in Alaska or (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing, and (3) in either case is not done in a wasteful manner. This exemption does not extend to any marine mammal, the taking of which has been prohibited as one belonging to an endangered species pursuant to the Endangered Species Conservation Act of 1969. Such subsistence purposes include taking for food, clothing, heating, and other necessities of life. The subsection specifically defines the term "authentic native articles of handicrafts and clothing" to permit sales in interstate and foreign commerce.

As defined, "authentic native articles of handicrafts and clothing" must be manufactured without the use of mass copying devices in the exercise of traditional native handicrafts, including improved methods of production utilizing modern implements, such as sewing machines, so long as no large scale mass production industry results. The formation of traditional native groups, such as cooperatives is permitted under the Act. This subsection also permits the sale of edible portions of marine mammals, such as meat, skin, and seal oil in Alaska native villages and towns or for consumption by Alaskan natives presently residing outside the state. It is intended that federal and state authorities both will work with the natives to insure that the taking of any species of marine mammal is accomplished without undue loss of such mammals. Examples of some areas in which such governmental cooperation may be undertaken are the taking of bowhead whales, some of which are lost beneath the ice, and alleged infrequent incidents of indiscriminate firing into walrus herds by native hunters.

This subsection also allows the Secretary (or the State of Alaska if such authority is delegated) to place limitations upon the taking of any marine mammal by Alaskan Eskimos, Indians or Aleuts if the Secretary determines any species or stock of marine mammal to be depleted. It is intended that the Secretary, in establishing such limitations, shall designate the species or the stock of the species in question, as well as a description of the geographical area involved, the season for taking, or any other factors contributing to such limitations. The limitations shall be lifted as soon as the need for imposing them has disappeared.

(c) This subsection qualifies the moratorium section further by permitting the Secretary to allow persons up to one year as a grace period during which they need not comply with provisions of the Act, as the Secretary determines. It does not apply, however, to persons covered by section 101 (a) (2). This exception to the Act only operates at the discretion of the Secretary, and is designed to minimize undue economic hardship. The concept is taken directly from section 3(b) (16 U.S.C., 668cc-3(b)) of the present Endangered Species Act. The Endangered Species Act authorizes the Secretary of Interior, in order to minimize undue economic hardship to a person importing a species of fish or wildlife that is placed upon the endangered species list, to continue such importation in such quantities and for such periods not to exceed one year as the Secretary deems appropriate. The situation which will arise upon enactment of the Marine Mammal Protection Act is analogous to the situation which occurs under the Endangered Species Act when a new animal is placed on the Endangered Species List. Substantial adjustments will be required to take account of the new law just as an importer of an endangered animal which suddenly is placed on the list will need to make adjustments in his contracts, etc. The situation is directly analagous [sic] in the case of tunafish processors since, without the special exception, it could happen that a processor would be forbidden to import tunafish for which he may have contracted because of section 102(c).

Prohibitions

Sec. 102. (a) This section states that it is unlawful, except as provided in sections 101 (moratorium), 103 (regulations), 104 (permits), 111 (gear development research) and 113 (treaties) or any person or vessel subject to the jurisdiction of the United States to take any marine mammals on the high seas. It also prohibits any person or vessel or conveyance from taking any marine mammal on waters or lands under the jurisdiction of the United States unless expressly provided for by an existing international treaty, convention, or agreement to which the United States is a party.

In addition, it is unlawful for any person to use any port, harbor, or other place under the jurisdiction of the United States in connection with a prohibited taking or to use such port for unlawful importation of marine mammals or marine mammal products. The subsection further prohibits any person subject to United States jurisdiction from possessing, transporting, selling or offering for sale any marine mammal taken unlawfully. It also makes it unlawful for any person to use, in a commercial fishery, any fishing techniques that are in violation of any regulations issued by the Secretary for the purposes of carrying out this Act.

(b) This subsection makes it illegal to import any marine mammal within certain specified categories unless that mammal is imported pursuant to permit issued for legitimate scientific research. The categories of animals are those: 1) pregnant when taken, (2) nursing (either parent or young) or less than eight months old, whichever occurs later, (3) taken from a species or stock which has been designated by the Secretary as depleted or from a species which is listed as endangered or (4) taken inhumanely. This subsection will bar the import of marine mammals or products taken from the baby Canadian harp seal.

(c) This subsection imposes an absolute and permanent ban on the importation of animals taken in violation of this title or taken in a foreign country in violation of the laws of that country. Importation of marine mammal products is banned in cases where importation of the mammal would be banned and in cases where the sale of the product is prohibited by the country of origin. Once the Secretary has taken steps to control the types of gear that can be used in commercial fishing, this section would also ban importation of fish

caught by methods proscribed for fishermen subject to U.S. jurisdiction. This subsection will close the United States market to the tuna fish caught in this fashion.

(d) This subsection makes the subsections banning importations prospective only. It will serve to protect those with inventories of products at the time these actions become unlawful.

(e) This subsection states that provisions of the Act will not affect any marine mammal or marine mammal product which was taken before the date that the Act goes into effect.

Regulations on taking of Marine Mammals

Sec. 103. (a) This section establishes the basic theme of this Act. It states that the Secretary, on the basis of the best available scientific evidence and after consultation with the Marine Mammal Commission, shall issue regulations on the taking or importing of marine mammals to insure that such taking or importing would be consistent with the policies of the Act. There are undoubtedly some cases in which taking or importation are permissable. Indeed there may be instances where animal species or stocks may be benefited by removing excess members or where the health of the ecosystem would be served by a selected harvesting of members of certain species or stocks. In all these cases, the Secretary will establish appropriate regulations which will permit the taking or importing of these animals.

(b) This subsection lists the general criteria which may be considered by the Secretary in the process of prescribing regulations under the Act. These include a wide range of factors such as the effect of limitations on present and future animal populations, U.S. treaty requirements, ecological and environmental considerations, the conservation and development of fishery resources and economic and technological feasibility.

The Secretary, for example, in regulating the operations of the tuna industry with respect to the incidental catching of porpoises must consider the technical capability of these fishermen to avoid injury to porpoises. It is not the intention of the Committee to shut down or significantly to curtail the activities of the tuna fleet so long as the Secretary is satisfied that the tuna fishermen are using economically and technologically practicable measures to assure minimal hazards to marine mammal populations.

(c) The regulations prescribed by the Secretary may include a number of factors: the number of animals to be taken or imported, what animals may be taken or imported, when and from where this taking or importing may take place and restrictions on certain fishing techniques which he has found to cause undue fatalities to marine mammals in the particular fishery involved.

(d) This subsection requires the establishment of regulations to be made on the record after opportunity for hearing. Before or at the time of announcing proposed regulations, the Secretary is required to make available to the public a number of documents: (1) a statement of the size of the population affected, (2) a statement on the impact of his proposed regulations on the optimum sustainable population of the species or stock involved, (3) the scientific evidence upon which he proposes to base his regulations, and (4) any studies or recommendations relating to these regulations. At this point in the development of the rulemaking procedure the public is given the right, and the necessary

information, to participate, and if it considers such action appropriate, to protest against the establishment of these regulations.

(e) This subsection requires the Secretary to report on the status of marine mammals to the public and the Congress within six months of the effective date of the Act and once a year thereafter, and in his report the Secretary shall outline the actions he has taken, and those measures believed necessary to assure the well being of such marine mammals.

Permits

Sec. 104. (a) This subsection allows the Secretary to issue permits authorizing the taking or importation of any marine mammal.

(b) This subsection requires permits issued under the authority of the Act to be consistent with the regulations prescribed in Sec. 103 and states that such permits specify terms and conditions under which the animals may be taken or imported. Whenever the reason for such taking is overpopulation, before issuing any permit to take a mammal the Secretary must first consider the possibility of transporting excess members of this population to other areas which were formerly the habitat of such animals.

(c) Scientific research permits or permits for the display of marine mammals by profit and non-profit institutions must be issued by the Secretary subject to his requirements as to the manner in which those animals may be captured, transported and cared for. These permittees must also report to the Secretary on the ways in which these requirements have been carried out.

(d) This subsection authorizes the Secretary to prescribe procedures to carry out his permit authority. It requires him to make public notice of permit applications received and to invite comments from interested members of the public. Permit applicants must show that the taking or importation of marine mammals will be consistent with the purposes of this Act as indicated above and with regulations established under Sec. 103. The subsection authorizes the Secretary to grant public hearings upon request of any interested party, if the request is made on a timely basis. The Secretary is instructed to act in an expeditious fashion and to make full public disclosure of his action in issuing or denying a permit requested. The subsection also authorizes permit applicants or opposing parties to obtain judicial review of the issuance or refusal to issue a permit under this section.

(e) This subsection authorizes the Secretary to modify, suspend or revoke permits to make them consistent with revised regulations under sec. 103, or where the permit has been violated. Such actions by the Secretary can only take effect after the permittee has had an opportunity for a hearing. Notice of such modification, suspension or revocation must be published in the Federal Register.

(f) This subsection requires permits issued by the Secretary to be in the possession of the authorized person during the process of the authorized taking or importation or at any other time incidental to that taking or importation. The copy of the permit must be physically attached to any container in which the marine mammal is placed or be aboard the vessel involved.

(g) This subsection requires the Secretary to charge a reasonable fee for permits issued, to be done through an informal rulemaking procedure allowing interested parties to comment.

(h) This subsection authorizes the Secretary to issue general permits to persons found to have common needs requiring them to take marine mammals, and to promulgate appropriate regulations covering the use of such permits. Fishermen, Eskimos, and others who may have a continuing problem or need may thus obtain general permits from the Secretary covering situations which occasionally arise requiring them to take mammals destroying their catch or gear. It would also cover incidental taking in fishing operations. While the taking of some mammals is intentional and not incidental to the fishing operation, there is no way of predicting exactly when these emergency type situations may arise. The permit would be subject to those regulations which the Secretary requires consistent with the purposes and policies of the Act and would permit taking only where circumstances require it.

Penalties

Sec. 105. (a) This subsection authorizes the assessment of civil penalties by the Secretary for violation of the Act or permits or regulations issued under the Act, in the amount of not more than $10,000 for each violation. If the penalty is not paid, the Secretary is authorized to refer the matter to the Department of Justice for action.

(b) This subsection authorizes criminal action and fines up to $20,000 for each violation or up to one year imprisonment, or both, for any person who knowingly violates the Act or permits or regulations issued thereunder.

Cargo Forfeiture

Sec. 106. This section makes the cargo or the monetary value thereof any vessel or other conveyance under U.S. jurisdiction subject to seizure and forfeiture when such vessel or other conveyance is employed in any way in the taking of any marine mammal which is made unlawful under the Act. Existing customs laws relating to seizure, forfeiture, and condemnation of cargo are applicable where appropriate.

Enforcement

Sec. 107. (a) The Secretary is charged with basic responsibilities for enforcement of Title I, except as otherwise provided. He is expected, however, to utilize other Federal agencies, such as the Coast Guard, for purposes of enforcement.

(b) The Secretary may also designate State officers and employees as enforcement agents, although they are not considered as U.S. employees for purposes of laws administered by the Civil Service Commission.

(c) This subsection authorizes U.S. judges and magistrates to issue warrants or other process required for enforcement of this Act.

(d) The subsection authorizes appropriate officials to execute warrants or processes. It further authorizes those officials to arrest persons violating the law in their presence or view, with or without a warrant, and permits searches of vessels or conveyances either with a warrant or other process, or if the officials has reasonable cause to believe a violation has occurred or is occurring. Such officials may also seize the cargo of any vessel where such vessel has been used in violation of the Act or reasonably appears to have been so used. Marine mammals or

marine mammal products taken in violation of the Act may also be seized and disposed of in accordance with appropriate regulations.

(e) This subsection requires the Secretary to expedite proceedings when a seizure has taken place. He is required to notify the owner or consignee of the seizure of these goods as soon as possible. When appropriate, the Secretary may either hold marine mammals or products, or other cargo, or permit the person concerned to retain them after posting bond. After assessment of civil penalties, the subsection permits the Secretary to proceed against the marine mammals and products or other cargo concerned, and forfeited, for appropriate disposition. The subsection requires marine mammals and products, and other cargo, seized in connection with a criminal violation to be forfeited to the Secretary. It allows the forfeiture of property or other items taken in conjunction with the violation. Marine mammal products, or other cargo, which have been seized must be returned to the owner or consignee, if (a) a civil penalty is assessed, but no action is taken to recover that penalty, or (b) if criminal action is unsuccessful and the Secretary has not thereafter commenced proceedings for the imposition of civil penalties.

International Program

Sec. 108. This section requires the Secretary, acting through the Secretary of State, to: (1) initiate negotiations for bilateral or multilateral agreements for the protection and conservation of the marine mammals covered by this Act, (2) initiate negotiations with foreign governments that either through their own involvement, or that of their citizens or companies, are engaged in commercial fishing operations which the Secretary has found to be unduly harmful to any species of marine mammals, in order to develop bilateral or multilateral treaties for the purposes of protecting such marine mammals, (3) encourage the development of other international agreements for the protection of specific ocean and land regions which are of special significance to marine mammals, (4) initiate the amendment of any existing international treaties for the protection and conservation of marine mammals in order to make such treaties consistent with this Act, (5) seek the convening of an international meeting on marine mammals before July 1, 1973, for among other things, the signing of a binding international convention for the protection and conservation of all marine mammals and further, for the implementation of paragraph 3 of this section, and (6) report to Congress within one year of the enactment of this Act on the results of the activities called for under section 108.

In addition, the Secretary shall, in consultation with the Marine Mammal Commission, initiate a study of the North Pacific Fur Seals. The study would have as its principal objective the determination of the present status of the population of the fur seal herd. If it is found that the fur seal herd is below the optimum sustainable population and is not moving upward toward such level, or has reached that level and is beginning a significant downward trend which is not merely a normal fluctuation, and he believes the herds to be in danger of depletion, he shall, through the Secretary of State, initiate negotiations for the modification of the North Pacific Fur Seal Convention. The principal objective of such modification would be to reduce or halt the taking of fur seals to the extent necessary to ensure that the herd will obtain,

and remain at, the optimum sustainable population. If studies indicate changes are not necessary in the Convention, or if negotiations to modify the treaty are unsuccessful, steps should be taken to assure the continuation of the Convention in order to prevent a return to pelagic sealing.

Federal Cooperation With States

Sec. 109. (a) Provides that no state may adopt or enforce any law or regulation on the taking of marine mammals unless it is consistent with this Act and the regulations issued thereunder. If the Secretary determines that a state's laws are consistent with the Act, the State's laws prevail and the Act does not apply within that state's jurisdiction except that the provisions of this section, section 110 and 111(b)(2) through the end of that section apply. The reference in section 109(a) to section 101 is designed to emphasize that, in order to qualify, a state's law must provide for a moratorium of the same nature required under the Act. However, the discretionary judgments and rulemaking activities during the moratorium which the Act provides for could be carried on by state authorities and not the Secretary. However, it is the intent that the Secretary does not waive all jurisdiction under this section. He should closely monitor the states to make sure that the purposes and policies of the Act are fulfilled and be prepared to reassert jurisdiction when and if necessary.

(b) This subsection authorizes the Secretary to make grants to the states to develop and implement laws and programs for the conservation of marine mammals consistent with the purposes and policies of the Act.

(c) Provides that the Secretary shall enter into cooperative agreements with state officials to delegate administration of the Act to the States.

Marine Mammal Research Grants

Sec. 110. (a) This subsection authorizes the Secretary to make grants or to provide other appropriate financial assistance to state and other agencies, public or private institutions, or other persons in order to assist them in carrying out research on subjects relevant to the protection and conservation of marine mammals.

(b) This subsection authorizes the Secretary to establish reasonable terms and conditions upon grants provided under the section 110 as appropriate to protect the interests of the United States. Any grant shall be reviewed by the Marine Mammal Commission prior to being given out.

(c) This subsection authorizes annually, for the fiscal year in which the section takes effect and for each of the next four fiscal years, $1,000,000 to the Secretary of the Interior and $2,000,000 to the Administrator of NOAA.

Commercial Fisheries Gear Development and Financial Assistance

Sec. 111. (a) The Administrator of NOAA is authorized to carry out a research and development program in order to devise better fishing methods and gear with the objective of reducing to maximum extent practicable the incidental taking of marine mammals during commercial fishing operations. The Administrator is authorized to issue such regulations as he deems necessary to carry out this objective of reducing the level of incidental taking of marine mammals. At the end of two full years the Administrator shall report to Congress the results of his research and development activities. If new fishing methods or gear are developed, which are capable of feasible application, the Administrator shall by regulations require the same to be adopted by persons engaged in commercial fishing operations. Persons following the regulations established by the Secretary under this section need not obtain permits for incidental taking of marine mammals during the first two years of the moratorium. The Secretary is authorized $1,000,000 for the fiscal year ending June 30, 1973, to carry out this subsection, and a like amount for the next following fiscal year.

The Administrator and the Secretary of State are further directed to commence negotiations within the Inter-American Tropical Tuna Commission in order to obtain essential compliance with the Act. The Administrator and Secretary of State are also authorized and directed to request the Director of Investigations of this Commission to make recommendations to the member nations of the Commission to utilize any new commercial fishing method and gear. Additionally, authorized agents of the Secretary are empowered to accompany U.S. commercial fishing vessels, if space is available, on fishing trips for purposes of research and observation.

(b) This subsection authorizes the Secretary to guarantee loans made to private borrowers by private lending institutions for the cost of equipping, altering, modifying, or improving commercial fishing vessels in order to comply with any requirements imposed by this Act or any rules, regulations, limitations, or permits issued by the Secretary pursuant to this Act for the purpose of reducing the taking of marine mammals incidental to commercial fishing. Minimum restrictions and limitations are established relative to any loan guarantees made under this subsection, including such things as the interest rates, maturity dates, security or other assurance of repayment, economic soundness and efficient and wise use of fisheries resources, premium charges, investigation fees, citizenship requirements, and requirements related to the ability, experience, resources, and other qualifications possessed by the applicant.

This subsection also creates a loan guarantee fund to be used as a revolving fund for the purpose of carrying out the provisions of this subsection. The Secretary is authorized $1,000,000 for the loan guarantee fund for the fiscal year ending June 30, 1973, and a like amount for the next following fiscal year. The full faith and credit of the United States is pledged to the payment of all loan guarantees made under this subsection. Upon repayment of the guarantee, the Administrator shall be entitled to take on assignment any collateral or security given by the borrower in connection to the loan. Loan guarantee payments shall be made in cash. If sufficient monies are not available at any given time in the loan guarantee fund, the Administrator may through appropriate transactions with the Secretary of the Treasury, in effect, borrow sufficient funds to cover any obligations. A limit of $20,000,000 is set on the amount of loans guaranteed that can be outstanding at any given time. An authorization to cover administrative expenses is included.

Regulations; Administration

Sec. 112. (a) This subsection authorizes the Secretary in consultaion with other appropriate federal agencies, if any, to adopt regulations to carry out the purposes of the Title.

(b) All federal agencies are authorized to cooperate on mutually agreeable terms with the Secretary in carrying out the purposes of the Title.

(c) This subsection authorizes the Secretary to enter into agreements, as necessary, with any person or agency of government in order to carry out the purposes of Title I of the Act.

(d) This subsection requires the Secretary to review annually all programs in which the United States participates, involving the taking of marine mammals on land. If the U.S. activities cannot be administered on lands owned by the United States in a manner consistent with the Act, the Secretary must thereupon suspend the program and notify the Congress, recommending legislation to resolve the problem.

Application to other Treaties and Conventions; Repeal

Sec. 113. This section makes it clear that the Act is to be applied as supplemental to and not in violation of existing international treaties, conventions or agreements, or any statutes which implement the same, which otherwise apply to marine mammals such as those applying to whaling and fur seals. Thus the Act does not apply to the North Pacific fur seal because this mammal is covered by the North Pacific Fur Seal Convention. It also repeals the proviso in the Act (16 U.S.C. 659) regarding the protection of sea lions in Alaskan waters.

This section also grants authority to the Secretary to issue a finding as to whether this Act shall apply to a violator or whether the penalties under any international treaty, convention or agreement with respect to the protection of marine mammals from takings incidental to commercial fishing operations shall apply. An example might be that the Inter-American Tropical Tuna Commission may adopt regulations effecting essential compliance with this Act. In such a case the Secretary may declare that section 105 of this Act does not apply and that penalties provided in the international agreement, treaty or convention do apply.

Authorizations

Sec. 114. (a) This subsection authorizes $2,000,000 to be appropriated annually for fiscal year ending June 30, 1973, and for the next four following fiscal years, to enable the Department of Commerce to carry out its responsibilities under Title I.

(b) This subsection authorizes the sum of $700,000 for the fiscal year ending June 30, 1973, and $525,000 for each of the next four years to be appropriated, to enable the Department of the Interior to carry out its responsibilities under Title I.

TITLE II—MARINE MAMMAL COMMISSION

Establishment of Commission

Sec. 201 (a) Establishes the Marine Mammal Commission.

(b) The Commission is composed of five members serving five-year staggered terms (except for those initially selected), appointed by the President from a list submitted by the Chairman of the Council on

Environmental Quality, the Secretary of the Interior, the Administrator of NOAA, and the heads of the National Science Foundation and the National Academy of Sciences of individuals who are knowledgeable in the fields of marine ecology and resource management and who are not in a position to benefit from the taking of marine mammals. The subsection bars existing government employees from service as a member of the Commission. Members of the Commission may not be reappointed unless serving as a replacement to fill a vacancy.

(c) The President shall designate the Chairman of the Commission from among the members.

(d) Members of the Commission shall be compensated on a daily rate equivalent of a GS–18 ($138.48 at this time) for each day the members are engaged in the actual performance of their duties. They are also entitled to reimbursement for travel expenses.

(e) The Title requires the appointment of an Executive Director who will be a full-time employee of the Commission, paid at a rate not in excess of that established for a GS–18.

Duties of Commission

Sec. 202. (a) The Commission is required to do the following:

(1) Review existing federal laws and international treaties relating to marine mammals, including those dealing with whales and fur seals.

(2) Review existing information on the stocks of marine mammals and ways in which they may be managed consistent with the purposes of the Act and of the most humane possible ways of taking marine mammals; it shall also review the research programs carried out under the Act and all applications for research permits, authorized under Sec. 103.

(3) Review and make recommendations concerning studies made in connection with the protection and conservation of marine mammals.

(4) Recommend to the Secretary, and to other officials, such additional steps as it considers desirable in the interest of marine mammals.

(5) Recommend appropriate policies to the Secretary of State for strengthening existing international treaties and recommend additional measures for protection and conservation of marine mammals.

(6) Recommend to the Secretary of the Interior revisions to the Endangered Species List as they may affect marine mammals, and

(7) Recommend to the Secretary, other officials, and the Congress measures deemed necessary or desirable to carry out the purposes of this Act, including those which it deems appropriate to protect Alaskan natives who may be adversely affected by the Act.

(b) The Commission is required to consult with the Secretary at either's request, and shall furnish its reports and recommendations before publication to them for comment.

(c) The Commission's reports and recommendations are specifically designated as public records, to be available to the public at all reasonable times. Other activities of the Commission are also matters of public record available to the public in accordance with the provisions of the Freedom of Information Act.

(d) Where the Commission has made recommendations to federal officials, those officials must respond within 120 days. Where those recommendations have not been followed or adopted, the appropriate

official is required to return them to the Commission together with a detailed explanation of his reasons for his failure to follow these recommendations.

Committee of Scientific Advisors on Marine Mammals

Sec. 203. (a) This section authorizes and directs the establishment of a Scientific Committee of nine independent scientists knowledgeable in marine sciences and the commercial fishing industry with emphasis on marine ecology and marine mammals affairs. The members of this Committee are to be appointed by the Chairman of the Commission, after consultation with the Director of the National Science Foundation, the Chairman of the National Academy of Sciences, the Secretary of the Smithsonian Institution and the chairman of the Council on Environmental Quality, and, unlike the Commission, may include government employees.

(b) The members of the Scientific Committee are to be compensated in like manner as the members of the Marine Mammal Commission.

(c) The Commission is required to consult with the Scientific Committee on studies and recommendations on research programs conducted under the authority of the Act and all applications for permits authorizing the taking of marine mammals for scientific purposes under section 103 of the Act. Recommendations made by the Committee, or members of the Committee, to the Commission which are not adopted by the Commission must be transmitted to the appropriate federal agency and the Congress with an explanation of the Commission's reasons for not accepting such recommendations.

Commission Reports

Sec. 204. This section requires the Commission to transmit to the Congress an annual report describing its activities, including findings and recommendations by and to the Commission, together with the responses to those recommendations.

Coordination with other Federal Agencies

Sec. 205. This section authorizes the Commission to have access to all Federal studies and data relating to marine mammals. It authorizes the Commission to utilize, with the consent of the appropriate Secretary, the facilities of federal agencies, under cooperative arrangements, and directs the Commission to take every feasible step to avoid duplication of research and to carry out the purposes of this Act.

Administration of Commission

Sec. 206. This section authorizes the Commission to do the necessary things in order to carry out its administrative responsibilities under the Act. Its financial and administrative services are to be provided by the General Services Administration and appropriate reimbursement made therefor.

Authorizations

Sec. 207. This section authorizes to be appropriated the sum of not to exceed $500,000 for the fiscal year in which Title II is enacted, and for the next four fiscal years thereafter.

Effective Date

Sec. 208. The provisions of this Act became effective 60 days after enactment.

MINORITY VIEWS OF MR. STEVENS

This Committee has worked hard to draft workable and scientifically accurate legislation that will establish sound programs for the future welfare of our valuable ocean mammal resources. And, I compliment the Chairman of the Subcommittee, the distinguished Senator from South Carolina (Mr. Hollings)—and other members of the full Committee—for their interest and diligence in attempting to reach a workable solution to this controversial problem. This bill is basically a good beginning. It is an attempt toward improved conservation practices which might assist in the restoration and maintenance of marine animal populations.

However, under this bill, two problems are not completely solved. First, I was hopeful that the bill could have excluded entirely those citizens whose culture and very existence is dependent upon marine mammals—the Alaska Natives. I am pleased, of course, that the Chairman of the full Commerce Committee—Senator Magnuson—authorized hearings to be held in Alaska so that the hearing record would reflect Alaska's Native people. Second, this bill does not do justice to those who will carry out the bulk of protection and management activity, State fish and wildlife agencies.

Alaska Natives are not totally exempt under this bill. They should be. If the problems of these citizens were fully recognized and their needs provided for, they would be.

Many Alaska Natives are completely dependent upon ocean mammal resources for their existence. For these people, ocean mammals provide not only food and clothing, but also, through the sale of meat, seal oil, handicrafts, and clothing, the only available source of money income with which they may purchase a few of the basic human needs taken for granted by everyone else in America. I feel our nation is morally bound to respect the traditions and life style of these people. They do not waste these mammals. They live in an area of the world as harsh as any on the face of the globe. They cannot afford to waste any animal, nor even any part of one.

State fish and wildlife agencies posess [sic] greater expertise, equipment and manpower to protect and manage ocean mammals than does the federal government. Without the full participation of the states, any national ocean mammal program is doomed to failure. Our total national interest in protecting marine mammals requires that the maximum opportunity be provided for the scientific management of these animals through full utilization of the manpower and knowledge of the appropriate state agencies within their jurisdiction.

Under the bill, scientific management contemplates complete or partial prohibition against taking when proven necessary for the well-being of species or population stocks. The bill calls for state assistance in enforcing the provisions of the Act. But, it also infringes upon the states' long-recognized right to protect and manage resident species within state jurisdiction.

As a matter of national policy, the separation of federal and state authority as it pertains to wildlife management was spelled out in a regulation signed on September 10, 1970 by then Secretary of the Interior Walter J. Hickel. The regulation stated in part: "The several states have the authority to control and regulate the capturing, taking and possession of fish and resident wildlife by the public within state boundaries." Many populations of ocean mammals—including those of sea otters, sea lions, and walrus—are resident animals, wholly or in part.

I do not believe this bill should disrupt the long-standing cooperative arrangements between federal and state agencies regarding resident or migratory species of wildlife. Those agreements recognize the rights of states to manage fish and game resources within their borders. This bill encroaches on state authority to manage resident species—as such, it creates a problem rather than solves one.

Marine mammals themselves will benefit most from maximum attention by both state and federal agencies responsible for wildlife. The federal government does not have adequate personnel nor capability to administer this marine mammal program within state borders. As written, this bill will require, annually, millions of additional federal dollars for enforcement and protection of marine mammals.

I had hoped that the bill as reported would adopt the language of Section 109 of S. 3161 which provides for federal-state cooperation in this field. That bill has been widely acclaimed by wildlife professionals from all parts of the country as a sound program for the conservation of ocean mammals. Many professional wildlife organizations and agencies have passed resolutions in support of S. 3161. I regret that the Committee did not accept Section 109 of that bill.

The principle involved here is identical to that involved in S. 1232 introduced in the 91st Congress by Senators Morse, Bible, Cannon, and Church. Legislation similar to S. 1232 has passed the Senate repeatedly. As pointed out in Senate Report No. 91-551 accompanying S. 1232, states must have the right to regulate and manage all fish and wildlife within their borders. There are historic patterns that have evolved in this country under which the states have exercised primary responsibility and jurisdiction with respect to resident fish and wildlife. Such authority resides in the states "in trust for the benefit of their people independent of jurisdiction over or ownership of land, . . . it is essential to the conservation programs of the states that primary authority over wildlife not be eroded and that the responsibilities of federal departments and agencies with respect to conservation and development of natural resources, including fish and wildlife on federally-owned lands, should be exercised in accordance with State laws and regulations."

The same principle applies, whether the animals are on federally-owned land or in the ocean. The states must have primary authority within their borders in either case.

TED STEVENS.

SUPPLEMENTAL VIEWS OF MR. COTTON

I wish to associate myself with the position taken by my distinguished colleague from Alaska (Mr. Stevens) on the second problem which he raises in his Minority Views on this bill, S. 2871. I share his concern that this bill does not do justice to the State fish and wildlife agencies which will carry out the bulk of protection and management activity. I know that this is a very real concern shared by the Fish and Game Department of my own State of New Hampshire.

NORRIS COTTON.

ADDITIONAL VIEWS OF MESSRS. HART AND GRIFFIN

Although many of the provisions of S. 3871 have aroused considerable controversy both within and outside the Congress. We believe that the bill as reported could, if properly administered, enhance our effort to protect marine mammals. With regard to most of the controversial issues resolved by the Committee, creditable arguments on either side of the question resulted in the "close case" which is so often presented to legislators. In on area, however, we believe the Committee's action was clearly contrary to the public interest. The committee decided that authority over marine mammal protection under S. 2871 should be divided between the Department of the Interior and the Commerce Department's National Oceanic and Atmospheric Administration (NOAA). Under the committee bill, NOAA would administer the program as it relates to whales, porpoises and seals; Interior would be authorized to protect polar bears, walruses, manatees and sea otters. It is our view that the program should not be split, and that Interior is the proper government agency in which to place all the authority granted by the bill.

The administrative discretion allowed by S. 2871, we would argue, should be exercised by the Secretary of the Interior, whose department has expertise in the conservation of wildlife, rather than by the Administrator of NOAA, whose parent department has a commercial orientation. While it may be that NOAA has done a creditable job thus far without interference from the commercial interests within the Department of Commerce, this does not justify preserving the possibility of such interference when it could be eliminated by granting the Department of the Interior sole jurisdiction.

Placing all ocean mammals under one department is not likely to result in any great duplication of effort, because the Interior Department would be able to enter into agreements with NOAA to utilize their personnel, facilities and expertise. We are confident that Interior, with the addition of a few marine mammal scientists and the cooperation of NOAA, would be able to administer the Act effectively. In the past, we have traditionally entrusted the protection of wildlife to the Department of the Interior. We see no reason to break from that tradition in this area.

PHILIP A. HART.
ROBERT P. GRIFFIN.

ADDITIONAL VIEWS OF MR. SPONG

Although the bill reported by the Committee represents an improvement in existing authority to curb the taking of marine mammals, I am apprehensive over those sections of the measure relating to the importation of such species.

The House version of this legislation sought to dampen the American market for seal skins by permitting imports solely for processing. Such imports could be admitted only under a bond requiring that they be exported within two years. There is no comparable provision in the bill approved by the Committee. Instead, the measure gives broad authority to the Secretary of Commerce to waive the provisions of the moratorium section of the bill so as to permit the taking of ocean mammals, and to allow both imports and exports.

Such broad administrative discretion might be acceptable if it were to be exercised by the Department of the Interior. That agency, in my view, is oriented toward the conservation of wildlife. The Commerce Department has a history of being oriented toward commercial development.

Jurisdiction is divided under the Committee bill. The Department of Commerce (NOAA) would have authority over seals, whales, and porpoises. Interior would administer the legislation as it relates to walruses, sea otters, manatees and polar bears. In my judgment, jurisdiction should not be divided. I believe authority would be more appropriately vested entirely in the Department of the Interior. I voted accordingly within the Committee, but the amendment to give jurisdiction to the Interior Department was defeated.

The discretionary provisions of the permit section of the bill are especially troublesome if jurisdiction is to be entrusted to the Commerce Department. Under the Committee bill, a person having a permit to take marine mammals must be afforded an opportunity for a hearing whenever the Secretary proposes to modify, suspend or revoke such permit. In other words, if a permittee wants a hearing, he must be given one.

However, there is no requirement for a hearing which may be requested by a person opposed to the original issuance of a permit. This seems to me to be inconsistent, and unfair. If a hearing is not required for the issuance of a permit, it should not be required for a revocation, modification, or suspension of a permit, despite the economic interest that may be involved. A hearing ought to be required in both instances if affected or interested persons want a hearing.

WILLIAM B. SPONG, Jr.

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92D CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 92–1488

MARINE MAMMAL PROTECTION ACT OF 1972

OCTOBER 2 1972.—Ordered to be printed

Mr. GARMATZ, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 10420]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 10420) to protect marine mammals; to establish a Marine Mammal Commission; and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act, with the following table of contents, may be cited as the "Marine Mammal Protection Act of 1972."

TABLE OF CONTENTS

Sec. 2. Findings and declaration of policy.
Sec. 3. Definitions.
Sec. 4. Effective date.

TITLE I—CONSERVATION AND PROTECTION OF MARINE MAMMALS

Sec. 101. Moratorium and exceptions.
Sec. 102. Prohibitions.
Sec. 103. Regulations on taking of marine mammals.
Sec. 104. Permits.
Sec. 105. Penalties.
Sec. 106. Vessel fine, cargo forfeiture, and rewards.
Sec. 107. Enforcement.
Sec. 108. International program.
Sec. 109. Federal cooperation with States.
Sec. 110. Marine mammal research grants.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 10420), to protect marine mammals, to establish a Marine Mammal Commission and for other purposes, submit the following joint statement to the House and to the Senate in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The Senate struck out all of the House bill after the enacting clause and inserted a substitute amendment. The committee of conference has agreed to a substitute for both the House bill and the Senate amendment. Except for technical, clarifying and conforming changes, the following statement explains the differences between the House bill and the Senate amendments thereto.

PROVISIONS OF THE CONFERENCE SUBSTITUTE

TITLE I—CONSERVATION AND PROTECTION OF MARINE MAMMALS

Section 3. Definitions

To a large extent, the Senate amendment's definition of "depleted" is similar in scope to the language of the proposed Administration amendment to the Endangered Species Act of 1969. The House bill would have allowed a species or stock to be termed depleted and become protected before becoming threatened with extinction. The conference substitute requires consultation with the Marine Mammal Commission and the Committee on Scientific Advisors on Marine Mammals before a designation of a "depleted" species or stock is made. The conference substitute will allow species or stocks to be protected before they have reached endangered status.

The designation of a species or stock as depleted under the conference substitute, however, will not automatically qualify an animal for protection under the Endangered Species Act of 1969 and will not expand that Act, as it is presently written, to cover endangered stocks within otherwise abundant species.

Section 101. Moratorium

The House bill included a five-year moratorium, with certain exceptions (scientific research, commercial fishing, Alaska fur seals and processing of skins). The Senate amendment provided for a permanent moratorium, except for scientific research and commercial fishing, and added a provision that allows the Secretary to waive the moratorium when such waiver would be compatible with the Act. The effect of the Senate amendment is to allow the Secretary to make a determination,

species by species, that a waiver is appropriate; once that determination has been made, he would then be in a position to set general regulations on the taking of mammals, subject to the protective devices incorporated into both the House bill and the Senate amendment, involving public review and participation, before any permits might be issued. The conference substitute adopts the Senate approach. The conferees declined to follow the precise formula adopted in the Senate version, however, which mandated public hearings on the Secretary's decision to waive the moratorium. Since Section 103 requires those procedures to be followed in any case before general regulations are issued, it seemed duplicative to require that the same steps be taken twice. By the same token, the Secretary's decision to waive the moratorium would not be a final action, from which appeal might be taken: recourse to the courts must await action under Section 103 of the Act. The conference substitute requires that the hearings to be held by the Secretary on the regulations which he proposes to adopt would also encompass his decision to waive the moratorium.

The House bill required permits (in almost every case general permits) covering commercial fishing operations to insure minimal risk to marine mammals. The Senate allowed regulations by the Secretary to the same end without the formal issuance of permits during the two-year period after date of enactment of the Act, and expressed a general goal that damage to marine mammals shall be "reduced to insignificant levels approaching a zero mortality and serious injury rate." The Senate amendment also provided that during and after this two-year period, the objective of regulation would be to approach as closely as is feasible the goal of zero mortality and injury to marine mammals. The conferees agreed to the Senate approach. It may never be possible to achieve this goal, human fallibility being what it is, but the objective remains clear.

The House bill exempted Alaskan Indians, Aleuts and Eskimos from the moratorium and the permit requirements to the extent they take an animal for subsistence purposes, not wastefully and not for direct or indirect commercial sale. The Senate amendment extended the exemption to allow for the so-called "cottage industries" of the Alaskan natives. The House bill would prohibit the taking, by natives or anyone else, of animals belonging to an endangered species, whereas the Senate amendment would allow such animals to be taken by natives. The conferees essentially adopted the provisions of the Senate amendment.

The conferees were aware of the relatively small amount of solid data on the effects of native taking of marine mammals, and given that lack of information were not disposed unilaterally to terminate the present levels of taking by Alaskan Indians, Aleuts and Natives of marine mammals, including endangered species such as bowhead whales. The Secretary is given the authority to curtail or to terminate the native taking whenever he concludes that such taking is endangering, depleting or inhibiting the restoration of endangered or depleted stocks. The actions of the Secretary in administering the provisions relating to taking by natives will be subject to review by the public and by the Congress, in order to see that his responsibilities have adequately been met.

By retention of the phrase permitting "subsistence" taking by Alaska Natives, the conferees intend to permit taking not only for food but also for clothing, shelter, transportation, and the other necessities of life.

The Senate amendment provided a one-year exemption for reasons of financial hardship for persons other than commercial fishermen (who have a two-year exemption, already described) in language similar to that in the Endangered Species Act. The House has no such exemption. The conference substitute adopts the Senate language.

Section 102. Prohibitions

The House bill provided that no permits might be issued during the sixty-day period following the date of enactment of the Act; the Senate amendment indicated, on the other hand, that the Act itself would not be effective for sixty days, in order to allow the agencies involved time to prepare to administer the Act. The Conference substitute followed the Senate bill, but provided that the one year period allowed for hardship and the two-year period for research purposes should begin at the date of enactment, since as of that date those involved will have been put on notice that the Act will affect them.

The conferees discussed the provision prohibiting importation of any pregnant marine mammal. It is known that some marine mammals are technically pregnant almost year-round, and in the cases of others, it is extremely difficult for even trained observers to detect pregnancy except in the latter stages or in seasons when such animals are known to give birth. It is the intent of the conferees that the term "pregnant" be interpreted as referring to animals pregnant near term or suspected of being pregnant near term as the case may be.

Section 103. Regulations on Taking of Marine Mammals

The Senate amendment requires an annual report from the respective Secretaries on the marine mammal stocks within their jurisdiction and on steps taken to implement the Act. The conferees accepted the Senate version with the understanding that it would not require a complete restudy each year of every species and stock covered, but would rather permit the Secretary to update, where appropriate, what had been done since the last report was filed.

As a prerequisite to the issuance of regulations and the subsequent issuance of permits under the Act, the House bill required the Secretary to make a finding that the taking of marine mammals pursuant to such regulations would not be to the disadvantage of the species or stocks involved and would be consistent with the purposes and policies of this Act. The conferees accepted the House language. While clearly it would not be to the advantage of an individual animal to be removed from a population, the evidence was clear that in some circumstances it would be to the advantage of a species or stock to allow taking as part of a scientific management program. An obvious example would be the taking of animals from an overpopulated group, or removal of animals surplus to breeding needs.

Section 104. Permits

Under both the House bill and the Senate amendment, hearings must be held on the establishment of general regulations affecting a given category of marine mammals. However, the House version made hearings discretionary with relation to the subsequent issuance of permits while the Senate amendment required hearings on permits as well. The conference substitute adopted the House version. The agencies have indicated that the costs of compliance with the Senate version would perhaps double the cost of the program, to no purpose. In addition, the conference substitute adopts House language on general permits which the Secretary may issue as class permits to groups of persons such as commercial fishermen or non-Native Alaskans who depend on marine mammals for subsistence.

Section 106. Vessel Fine, Cargo Forfeiture, and Rewards

The House bill allowed the forfeiture of a vessel involved in the illegal taking of marine mammals, while the Senate amendment allowed cargo forfeiture, but restricted the liability of vessel owners to not more than $25,000. The conference substitute adopts the Senate provision.

An "unlawful taking," for the purposes of this section, would involve an intentional or wanton taking of a marine mammal by a vessel operator. It is not intended to mean the killing of a marine mammal by a vessel or its appurtenances as the result of an accident or Act of God, as for example, in the case of a steamship accidentally running into a marine mammal and injuring or killing it with its propellers. Careless operations of motorboats, on the other hand, in waters where mammals such as manatees or sea otters are known to exist, could constitute an unlawful taking within the meaning of the section.

Section 108. International Program

Both the House and Senate versions required that the Secretaries initiate international negotiations in order to expand the principles of H.R. 10420 to the high seas and to other countries. In general, the Senate version was more explicit in its requirements and was adopted by the conferees.

The House bill required permits to take Alaska fur seals, whereas the Senate bill did not; instead, it required a study of the problem in the light of the purposes and effects of the Interim Convention for the Conservation of the North Pacific Fur Seal. The conference substitute follows the Senate version, but amplifies the study to include ways in which the Act may be modified to meet the convention, or the convention to meet the Act. At the conclusion of this study, the Secretary is expected to report back to Congress with recommendations.

Section 109. Federal Cooperation With States

The House bill preempted State law, but allowed cooperative agreements with the States in harmony with the purposes of the Act. The Senate amendment allowed the Secretary to review State laws and to accept those that are consistent with the policy and purpose of the Act. The conference substitute clarifies the Senate version to assure that the Secretary's determination will control as to whether or not the State laws are in compliance. Once granted authority to implement its laws relating to marine mammals, the State concerned may issue permits, handle enforcement, and engage in research.

The precise point at which State programs may take effect will vary with the requirements imposed by the Act; where a permit must be issued for an animal to be taken or imported, approved State programs may be implemented following opportunity for public hearings and the issuance of regulations under section 103, and, where appropriate, waiver of the moratorium under section 101(a)(3).

Where no permit is required, State programs may be approved without prior Federal compliance with section 103 or waiver of the moratorium. Because of the special nature of the programs involved, however, it is not contemplated that the States will issue permits for scientific research or display under section 101(a)(1), or authorize hardship exemptions from the Act under section 101(c). It is contemplated, however, that the Secretary could issue general permits to State agencies which would, in turn, be authorized to assign, for example, scientific research permits to State employees or representatives of State universities for the taking of marine mammals.

The Secretary would not in any case, however, thereby waive all subsequent Federal jurisdiction over any such marine mammals. He must continue to monitor State programs to make sure the purposes and policies of the Act continue to be fulfilled, and be prepared to reassert Federal control if he deems it appropriate to accomplish these purposes and policies.

Section 111. Commercial Fisheries Gear Development

The Senate amendment authorized $1 million annually for two years for research on improved fishing methods which will minimize hazards to marine mammals. It also authorized the Secretary to regulate commercial fishing operations (and to board and observe vessels), to enter into negotiations with the Inter-American Tropical Tuna Commission and to guarantee private loans to private fishermen for the purpose of equipment to meet the requirements of the Act the House bill had no comparable provisions. The conference substitute adopts the Senate version, but eliminates the loan-guarantee program because it duplicates existing law.

TITLE II MARINE MAMMAL COMMISSION

The House bill would establish a three-member Commission, appointed by the President from a list submitted by the Council on Environmental Quality, and would give the Commission various powers, including the power to undertake studies on problems within its jurisdiction. The House bill authorizes funds of $1 million annually with no more than one quarter for administrative expenses. The Senate amendment would create a five-member commission, would require a list of members recommended by CEQ and other agencies, would not provide research authority and would limit annual authorizations to $500,000. The conference substitute follows the House version generally, although a widened list provision is included and the funds available for internal administration are increased to one-third of up to $1 million, with the balance to be spent on research purposes.

EDWARD A. GARMATZ,
JOHN D. DINGELL,
GLENN M. ANDERSON,
GEO. A. GOODLING,
PAUL N. McCLOSKEY, Jr.,
Managers on the Part of the House.

JOHN O. PASTORE,
ERNEST F. HOLLINGS,
DANIEL K. INOUYE,
PHILIP A. HART,
TED STEVENS,
MARLOW W. COOK,
LOWELL P. WEICKER, Jr.,
Managers on the Part of the Senate.

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95TH CONGRESS 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 95-336

MARINE MAMMAL PROTECTION ACT OF 1972 AUTHORIZATION

May 16, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MURPHY of New York, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[Including Cost Estimate of the Congressional Budget Office]

[To accompany H.R. 4740]

The Committee on Merchant Marine and Fisheries to whom was referred the bill (H.R. 4740) to increase the appropriations authorization for fiscal year 1978 and authorize appropriations for fiscal year 1978 to carry out the Marine Mammal Protection Act of 1972, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

On page 2, line 6, strike "$1,100,000," and insert in lieu thereof "$1,200,000,".

On page 2, line 8, strike "1978."." and insert "1978."

On page 2, between lines 8 and 9, add a new subsection to read:

(3) $200,000, all of which shall be available to the Secretary of Commerce, for the fiscal year ending September 30, 1978.

On page 2, line 16, strike "$10,000,000" and insert "$11,500,000".

On page 2, line 22, strike "$700,000" and insert "$850,000".

On page 3, strike all of lines 1 through 10 and insert the following in lieu thereof:

SEC. 3. Section 207 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1407) is amended to read as follows:

"AUTHORIZATIONS OF APPROPRIATIONS

"SEC. 207. There are authorized to be appropriated for the fiscal year in which this title is enacted and for the next five fiscal years thereafter such sums as may be necessary to carry out this title, but the sums appropriated for any fiscal year other than the fiscal year ending September 30, 1978, shall not exceed $1,000,000, and the sum appropriated for the fiscal year ending September 30, 1978, shall not exceed $2,000,000."

Amend the title so as to read:

A bill to increase the appropriations authorization for fiscal year 1977 and to authorize appropriations for fiscal year 1978 to carry out the Marine Mammal Protection Act of 1972.

PURPOSE OF THE BILL

The purpose of H.R. 4740 is to extend the authorization period for the Marine Mammal Protection Act of 1972 through fiscal year 1978 and to increase the authorization level under the Act for Fiscal Year 1977.

LEGISLATIVE BACKGROUND

H.R. 4740 was introduced on March 9, 1977 by Mr. Leggett and cosponsored by Mr. Forsythe. The legislation was referred to the Departments of the Interior and Commerce and the Marine Mammal Commission for comments.

The Subcommittee on Fisheries, Wildlife Conservation, and the Environment held hearings on the legislation on March 15, 1977. The subcommittee received testimony from representatives of the Department of Commerce, Department of the Interior, Marine Mammal Commission, Monitor Inc., and The Society for Animal Protective Legislation.

All of the witnesses appearing before the subcommittee expressed their strong support for extending the authorization for appropriations for the act. The Department of the Interior suggested continuing the authorization level for their activities under the act at the level authorized for the past four fiscal years. The Department of Commerce suggested an authorization level of $5.5 million for fiscal year 1977 under section 114 of the act and $7 million for fiscal year 1978 under section 114. The Marine Mammal Commission testified that they supported an authorization level of $1 million.

The witness for the Society for Animal Protective Legislation strongly supported increasing the authorization levels in order to provide for a Department of Commerce observer on every tuna purse seine vessel fishing for yellowfin tuna by setting on porpoise.

The subcommittee gave careful consideration to the evidence presented at the hearings and the departmental reports. The subcommittee unanimously ordered H.R. 4740 reported to the full committee with two amendments. The subcommittee adopted an amendment which increased the authorization level to the Department of Commerce under section 114 in fiscal year 1978 by $1.5 million. This increase is needed to cover the operation and maintenance costs of a vessel supplied by the tuna industry to the Department of Commerce to conduct research on reducing the incidental mortality of porpoise during yellowfin tuna purse seine fishing operations.

Several bills now pending before the Committee on Merchant Marine and Fisheries require the industry to supply the Department of Commerce with such a designated research vessel. In 1976 the Department of Commerce and the tuna industry jointly chartered a vessel to develop techniques that might reduce the mortality of porpoise cap-

tured incidentally in the course of fishing operations. This cruise of the *Elizabeth C. J.* developed vitally important new information about gear technology and porpoise behavior.

The subcommittee also adopted an amendment which struck the second sentence of section 207 of the act requiring the Marine Mammal Commission to spend two-thirds of its funds on research activities. The committee feels that it would be impossible for the Marine Mammal Commission to meet this requirement in light of the Commission's fixed operating costs. These fixed operating costs cannot be reduced without severely impairing the Commission's ability to operate.

The Full Committee on Merchant Marine and Fisheries unanimously ordered H.R. 4740 reported to the House with amendments. In addition to the amendments adopted by the subcommittee, which the full committee concurred in, the full committee further amended the bill to increase the authorization level to the Department of the Interior under section 110 by $100,000; to provide authorized appropriations to the Department of Commerce under section 110 of $200,000; and to increase the authorization level to the Department of the Interior under section 114 by $150,000.

The committee feels that the increased funds added by the Full Committee should, if appropriated, be used to provide matching grants to States under section 109 of the act and research grants under section 110. Specifically, the committee is concerned that States such as Alaska and California, which have regained management responsibilities over various species of mammals, receive adequate assistance from the Federl [sic] Government to effectively administer their marine mammal conservation programs.

Background and Need for the Legislation

The Marine Mammal Protection Act was enacted in 1972 for the purpose of ensuring that marine mammals did not diminish below their optimum sustainable population. In passing the act, Congress responded to the growing concern about man's impact on marine mammals which include whales, porpoises, seals, sea otters, polar bears, and manatees.

The act gave to the Secretaries of the Interior, and Commerce the authority and direction to establish general limitations upon the taking of all marine mammals. Criminal and civil penalties are prescribed for violations of the act, and the importation of marine mammals and their products is subject to regulation. The act created a three member Marine Mammal Commission which is charged with responsibility of monitoring the implementation of the act, recommending policies to the two Secretaries, and undertaking such research as is deemed appropriate.

Since the passage of the act the agencies have engaged in a wide variety of research and management activities dealing with marine mammals. The Department of Commerce is currently engaged in research on fur seals and their ecosystems, whales and related species, and the population status of several species of porpoise.

The Department of the Interior is currently engaged in a number of research projects designed to provide information on the species under their jurisdiction. These projects are designed to obtain basic information on the marine mammal environment. Current studies of community interactions and ecosystem functions of marine mammals will expand into modeling approaches that will allow us to predict what will happen to given population segments under expected circumstances. As an example, the Department of the Interior is engaged in an analysis of the population status of polar bears, biological and reproductive studies, and the effects of environmental pollution on the animals. This research has concentrated on studies of distribution and general movements as well as den ecology and location. Cooperative studies with Canada and the U.S.S.R. have been utilized to avoid duplicative efforts.

A large part of the time, money and effort of the Marine Mammal Commission and the Department of Commerce has been spent in an attempt to find a solution to the tuna-porpoise problem. The tuna-porpoise controversy results from fishing practices which make use of the little understood relationship between yellowfin tuna and certain species of porpoise. Commercial tuna purse-seiners herd porpoise, enclose them with nets, and thereby catch the yellowfin tuna which swim beneath and behind them. Thousands of porpoise, incidentally taken in order to catch the tuna, are killed when they become entangled in the nets.

A great deal of effort has gone into accumulating and analyzing data on the status of porpoise populations in order to establish a permissible quota of animals to be taken by the tuna fishermen. The Marine Mammal Commission and the Department of Commerce are extensively involved in developing fishing gear and techniques which reduce the incidental kill of porpoise.

A major portion of the funds authorized for the Department of Commerce would go, if appropriated, to fund a 100 percent observer program on all large tuna purse seine vessels. The Department of Commerce has indicated to the committee that $5 million would adequately fund a full observer program. The committee feels that the institution of a full observer program is vitally necessary to collect much-needed data on porpoise mortality and porpoise population levels.

H.R. 4740 would permit the agencies to continue and accelerate these various research and management programs. The bill provides a total authorization to the Department of the Interior of $2.05 million, of which $1.2 million will be spent on research under section 110. The bill authorizes appropriations of up to $11.5 million for the Department of Commerce under section 114 for all activities. The Marine Mammal Commission is authorized to be appropriated up to $2 million in fiscal year 1978.

Fiscal Year 1977 Supplemental Authorization

H.R. 4740 would increase from $2 million to $8 million the amount of funds authorized to be appropriated for the Secretary of Commerce under section 114 for fiscal year 1977. This is an emergency au-

thorization intended to enable the Secretary to meet expanded responsibilities mandated by the Federal courts in the tuna-porpoise controversy.

The supplemental authorization would allow the Secretary to expand the tuna-porpoise observer program as required by recent court decisions. The House has already passed a supplemental appropriation for the Department of Commerce in this area.

The need for this supplemental authorization arose out of a series of judicial decisions in 1976. In 1976, several environmental groups challenged the legality of the 1976 regulations governing the fishing of yellowfin tuna by setting on porpoise, in litigation brought in the District Court for the District of Columbia.

On May 11, 1976 Judge Charles R. Richey issued an opinion and order declaring the Commerce regulations, general permit and certificates of inclusion issued to tuna fishermen void as contrary to the provision of the Marine Mammal Protection Act. *(Committee on Humane Legislation, Inc.* v. *Elliot L. Richardson, et al.* (C.A. No. 74–1465) *and Fund for Animals et al.* v. *Elliot L. Richardson, et al.*, 414 F. Supp. 296 (D.D.C. 1976).

The court found that the Department of Commerce had granted the tuna industry an unrestricted general permit, without limitation as to the number or kind of porpoise which might be killed, in contravention of the act. The court found that the Department failed to comply with the provisions of the act which require the agency to determine and publish reasonable estimates of the existing population levels of each species affected by the regulations, the optimum sustainable population of each of those species, and the expected impact of those regulations on the effort to achieve an optimum sustainable population level for each species. On August 6, 1976 the court of appeals affirmed the decision of the district court.

In order to satisfy these rulings, the Department of Commerce must greatly expand its observer program to monitor the porpoise population levels. In addition, observer data is necessary to determine compliance with the act and regulations promulgated under the act.

The committee considers this supplemental authorization as vitally necessary to enable Commerce to comply with the court decisions and prevent wholesale disruption of the American tuna industry.

The following is a chart of the authorizations and appropriations under the Marine Mammal Protection Act since fiscal year 1974:

AUTHORIZATIONS AND APPROPRIATIONS UNDER THE MARINE MAMMAL PROTECTION ACT

	Fiscal year 1974		Fiscal year 1975		Fiscal year 1976		Fiscal year 1977	
Section—Agency	Authorization	Appropriation	Authorization	Appropriation	Authorization	Appropriation	Authorization	Appropriation
110—Interior . . .	$833,000	$833,000	$833,000	$833,000	$833,000	$833,000	$833,000	$833,000
114—Interior . . .	525,000	525,000	525,000	525,000	525,000	525,000	525,000	525,000
110—Commerce .	1,666,667	0	1,666,667	700,000	1,666,667	1,100,000	1,666,667	1,666,667
114—Commerce .	2,000,000	986,000	2,000,000	350,000	2,000,000	1,382,000	2,000,000	1,778,000
207—Marine Mammal Commission . .	825,000	412,000	1,000,000	750,000	1,000,000	900,000	1,000,000	1,000,000

SECTION-BY-SECTION ANALYSIS

There follows a section-by-section summary of H.R. 4740 accompanied by discussion where appropriate:

Section 1

Section 1 of the legislation would authorize $1.2 million to be appropriated to the Secretary of the Interior for carrying out his functions under section 110(c) of the act in fiscal year 1978. Section 110(a) of the act authorizes the Secretary to make research grants for the conservation and protection of marine mammals. There would be authorized to be appropriated to the Secretary of Commerce $200,000 under section 110(c) of the act for fiscal year 1978.

Section 2

Section 2 of the legislation would authorize to be appropriated $8 million to the Secretary of Commerce for fiscal year 1977 and $11.5 million for fiscal year 1978 under section 114 of the act. As previously explained, the 1977 supplemental authorization is required by the Department of Commerce to expand their tuna-porpoise observer program to satisfy recent court decisions. Section 114 of the act authorizes funds to be appropriated to the Secretaries of the Interior and Commerce to carry out their responsibilities under the act.

In addition, section 2 would also authorize to be appropriated to the Secretary of the Interior $850,000 in fiscal year 1978 under section 114 of the act.

Section 3

Section 3 of the legislation would authorize to be appropriated under section 207 of the act $2 million to the Marine Mammal Commission in fiscal year 1978 to carry out its responsibilities under the act.

COST OF LEGISLATION

In the event this legislation is enacted into law and fully appropriated the maximum cost to the Federal Government in fiscal year 1977 would be $6 million, and the maximum cost in fiscal year 1978 would be $15,750,000.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the committee estimates that the enactment of H.R. 4740 would have no significant inflationary impact on the prices and cost in the national economy.

COMPLIANCE WITH CLAUSE 2(1)(3) OF RULE XI

(A) The Subcommittee on Fisheries, Wildlife Conservation and the Environment held oversight hearings on this act on February 17, 1977 and March 2, 1977. The subcommittee does intend to hold further oversight hearings on the administration of this act from time to time during the 95th Congress.

(B) The requirements of section 308(a) of the Congressional Budget Act of 1974 are not applicable to this legislation.

(C) The Committee on Government Operations has sent no report to the Committee on Merchant Marine and Fisheries pursuant to clause 2(b)(2) of rule X.

(D) A letter was received from the Director of the Congressional Budget Office, pursuant to section 403 of the Congressional Budget Act of 1974 in reference to H.R. 4740 and follows herewith.

CONGRESSIONAL BUDGET OFFICE,
U. S. CONGRESS,.
Washington, D.C., May 16, 1977.

Hon. JOHN M. MURPHY,
Chairman, Committee on Merchant Marine and Fisheries,
Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 4740, a bill to increase the appropriations authorization for the fiscal year 1978 and authorize appropriations for fiscal year 1978 to carry out the Marine Mammal Protection Act of 1972.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

MAY 16, 1977.

1. Bill number: H.R. 4740.

2. Bill title: To increase the appropriations authorization for the fiscal year 1978 and authorize appropriations for fiscal year 1978 to carry out the Marine Mammal Protection Act of 1972.

3. Bill status: As reported by the House Committee on Merchant Marine and Fisheries.

4. Bill purpose: The purpose of this bill is to authorize appropriations to carry out the purposes of the Marine Mammal Protection Act of 1972. New authorizations are made for Marine Mammal Research Grants, for the purposes of title I of the act (Conservation and Protection of Marine Mammals), and for the Marine Mammal Commission (MMC). In addition to the fiscal year 1978 authorizations, this bill also provides for increased authorizations for fiscal year 1977 for title I. This bill is authorizing legislation which requires subsequent appropriation action.

5. Budget impact:

[In millions of dollars]

Net additional authorization, fiscal year:	
1977	$6.00
1978	15.75
1979	——
1980	——
1981	——
1982	——

Calendar No. 150

95TH CONGRESS
1st Session

SENATE

REPORT
No. 95–177

MARINE MAMMAL PROTECTION ACT AUTHORIZATION

MAY 16, 1977.—Ordered to be printed

Mr. MAGNUSON from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1522]

The Committee on Commerce, Science, and Transportation reports the bill (S. 1522), to increase the appropriations authorization for fiscal years 1977 and 1978 and to authorize appropriations for fiscal year 1978 to carry out the Marine Mammal Protection Act of 1972, and for other purposes, and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to extend the authorization period for the Marine Mammal Protection Act of 1972 through fiscal year 1978 and to increase the authorization level under the act. The bill would also prohibit the taking of any species of whale in the fishery conservation zone established by the Fishery Conservation and Management Act.

DESCRIPTION OF THE BILL

The original bill of the committee reauthorizes the provisions of the Marine Mammal Protection Act for an additional 1 year (through 1978) at the following levels:

Section 110	$1.1 million to the Department of Interior.
Section 114(a)	$8 million for the Department of Commerce for fiscal year 1977, and $11.5 million for fiscal year 1978.
Section 114(b)	$700,000 to the Department of the Interior for fiscal year 1978.
Section 207	$1 million for the Marine Mammal Commission for fiscal year 1977, and $2 million for fiscal year 1978.

Section 4 of the bill would amend the Marine Mammal Protection Act to make it unlawful for any person or vessel to take any species of whale in the fishery conservation zone of the United States, the so-called 200-mile limit.

BACKGROUND AND NEED

The Marine Mammal Protection Act was enacted in 1972 to provide increased protection to marine mammals found within U.S. jurisdiction; to restrict the importation and taking of marine mammals; and to create the Marine Mammal Commission to do research and review agency actions under the act. In passing the act, Congress responded to the growing concern about man's impact on marine mammals which include whales, porpoises, seals, sea otters, polar bears, and manatees.

The act gave to the Secretaries of Interior and Commerce the authority and direction to establish general limitations upon the taking of all marine mammals, and within those limitations, to issue permits for their taking. Criminal and civil penalties are prescribed for violations of the act, and the importation of marine mammals and their products is subject to regulation. The act created a three member Marine Mammal Commission which is charged with responsibility for monitoring the implementation of the act, recommending policies to the two Secretaries, and undertaking such research as is deemed appropriate.

Since the passage of the act the agencies have engaged in a wide variety of research and management activities dealing with marine mammals. The Department of Commerce is currently engaged in research on fur seals and their ecosystems, whales and related species, and the population status of several species of porpoises.

The Department of the Interior is currently engaged in a number of research projects designed to provide information on the species under their jurisdiction. These projects hopefully will obtain background information which serves as basic information for further studies on the marine mammal environment. Current studies of community interactions and ecosystem functions of marine mammals will expand into modeling approaches that will allow us to predict what will happen to given population segments under expected circumstances. As an example, the Department of Interior is engaged in an analysis of the population status of polar bears, biological and reproductive studies, and the effects of environmental pollution on the animals. This research has concentrated on studies of distribution and general movements as well as den ecology and location. Cooperative studies with Canada and the U.S.S.R. have been utilized to avoid duplicative efforts.

A large part of the time, money and effort of the Marine Mammal Commission and the Department of Commerce has been spent in an attempt to find a solution to the tuna-porpoise problem. The tuna-porpoise controversy results from fishing practices which make use of the little understood relationship between yellowfin tuna and certain species of porpoise. Commercial tuna purse-seiners herd yellowfin tuna which swim beneath and behind them. Thousands of porpoise, incidentally taken in order to catch the tuna are killed when they become entangled in the nets.

A great deal of effort has gone into accumulating and analyzing data on the status of porpoise populations in order to establish a permissable [sic] quota of animals to be taken by the tuna fishermen.

The Marine Mammal Commission and the Department of Commerce are extensively involved in developing fishing gear and techniques which reduce the incidental kill of porpoise.

The bill would permit the agencies to continue and accelerate these various research and management programs. The bill provides a total authorization to the Department of Interior of $1.8 million, of which $1.1 million will be spent on research under section 110. The bill authorizes appropriations of up to $11.5 million for the Department of Commerce under section 114 for all activities. The Marine Mammal Commission is authorized to be appropriated up to $2 million in fiscal year 1978.

A major portion of the funds authorized for the Department of Commerce would go, if appropriated, to fund a 100 percent observer program on all large tuna purse-seine vessels. The Department of Commerce has indicated to the committee that $5 million would adequately fund a full observer program. The committee feels that the institution of a full observer program is vitally necessary to collect much-needed data on porpoise mortality and porpoise population levels.

Fiscal Year 1977 Supplemental Authorization

The bill would increase from $2 million to $8 million the amount of funds authorized to be appropriated for the Secretary of Commerce under section 114 for fiscal year 1977. This is an emergency authorization intended to enable the Secretary to meet expanded responsibilities mandated by the Federal courts in the tuna-porpoise controversy.

The supplemental authorization would allow the Secretary to expand the tuna-porpoise observer program as required by recent court decisions. The Congress has already passed a supplemental appropriation for the Department of Commerce in thie [sic] area.

The need for this supplemental authorization arose out of a series of judicial decisions in 1976. In 1976, several environmental groups challenged the legality of the 1976 regulations governing the fishing of yellowfin tuna by setting on porpoise, in litigation brought in the District Court for the District of Columbia.

On May 11, 1976 Judge Charles R. Richey issued an opinion and order declaring the Commerce regulations, general permit and certificates of inclusion issued to tuna fisherman [sic] void as contrary to the provision of the Marine Mammal Protection Act. (*Committee on Humane Legislation, Inc.* v. *Elliot L. Richardson, et al.* (C.A. No. 74-1465) and *Fund for Animals et al.* v. *Elliot L. Richardson, et al.*, 414 F. Supp. 296 (D.D.C. 1976).

The court found that the Department of Commerce had granted the tuna industry an unrestricted general permit, without limitation as to the number or kind of porpoise which might be killed, in contravention of the act. The court found that the Department failed to comply with the provisions of the act which require the Agency to determine and publish reasonable estimates of the existing population levels of each species affected by the regulations, the optimum sustainable population of each of those species, and the expected impact of those regulations on the effort to achieve an optimum sustainable population level for each species. On August 6, 1976 the Court of Appeals affirmed the decision of the District court.

In order to satisfy these rulings, the Department of Commerce must greatly expand its observer program to monitor the porpoise population levels. In addition, observer data is necessary to determine compliance with the act and regulations promulgated under the act.

The committee considers this supplemental authorization as vitally necessary to enable Commerce to comply with the court decisions and prevent wholesale disruption of the American tuna industry.

The following is a chart of the authorizations and appropriations under the Marine Mammal Protection Act since fiscal year 1974:

AUTHORIZATIONS AND APPROPRIATIONS UNDER THE MARINE MAMMAL PROTECTION ACT

Agency	Fiscal year 1974		Fiscal year 1975		Fiscal year 1976		Fiscal year 1977	
	Authorizations	Appropriations	Authorizations	Appropriations	Authorizations	Appropriations	Authorizations	Appropriations
Sec.110–Interior	$833,000	$833,000	$833,000	$833,000	$833,000	$833,000	$833,000	$833,000
Sec.114–Interior	525,000	525,000	525,000	525,000	525,000	525,000	525,000	525,000
Sec.110–Commerce	1,666,667	0	1,666,667	700,000	1,666,667	1,100,000	1,666,667	1,666,667
Sec.114–Commerce	2,000,000	986,000	2,000,000	350,000	2,000,000	1,382,000	2,000,000	1,778,000
Sec.207–Marine Mammal Commission	825,000	412,000	1,000,000	750,000	1,000,000	900,000	1,000,000	1,000,000

Section-by-Section Analysis

SECTION 1

Section 1 would authorize $1.1 million for the Secretary of Interior to carry out its function under section 110 of the act in fiscal year 1978. Section 110 of the act authorizes the Secretary to make research grants for the conservation and protection of marine mammals. The Secretary of Commerce would be authorized to be appropriated $200,000 under section 110 of the act for fiscal year 1978.

SECTION 2

Section 2 of the legislation would authorize to be appropriated $8 million to the Department of Commerce for fiscal year 1977 and $11.5 million for fiscal year 1978 under section 114 of the act. As previously explained, the 1977 supplemental authorization is required by the Department of Commerce to expand their tuna-porpoise observer program to satisfy recent court decisions. Section 114 of the act authorizes funds to be appropriated to the Departments of Interior and Commerce to carry out their responsibilities under the act.

Section 2 would also authorize the Secretary of Interior to be appropriated $700,000 in fiscal year 1978 under section 114 of the act.

SECTION 3

Section 3 of the legislation would authorize the Marine Mammal Commission to be appropriated $2 million in fiscal year 1978 under section 207 of the act. Section 207 of the act authorizes the Marine Mammal Commission to be appropriated funds to carry out its responsibilities under the act.

SECTION 4

Section 4 of the legislation would amend section 102 of the Marine Mammal Protection Act to make it unlawful for any person or vessel or other conveyance to take any species of whale in the fishery conservation zone of the United States, as defined in section 3(8) of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1802(8)).

ESTIMATED COSTS

Pursuant to the requirements of section 252 of the Legislative Reorganization Act of 1970, the committee estimates that the cost of the proposed legislation would be as follows:

	Fiscal year—	
	1977[1]	1978
Sec. 110		$1,100,000
Sec. 114(a)	$8,000,000	11,500,000
Sec. 114(b)		700,000
Sec. 207	1,000,000	2,000,000

1 Including an increase in the authorization for fiscal year 1977 on an emergency basis.

95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 95–1028

MARINE MAMMAL PROTECTION ACT OF 1972 AUTHORIZATION

MARCH 31, 1978.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. MURPHY of New York, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H.R. 10730]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 10730) to authorize appropriations to carry out the Marine Mammal Protection Act of 1972 during fiscal years 1979, 1980, and 1981, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That section 109 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1379) is amended by adding at the end thereof the following new subsection:

"(d)(1) There are authorized to be appropriated to the Department of the Interior, for the purposes of carrying out this section, not to exceed the following sums for the following fiscal years:

"(A) $400,000 for each of the fiscal years ending September 30, 1979, September 30, 1980, and September 30, 1981.

"(2) There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out this section, not to exceed the following sums for the following fiscal years:

"(A) $225,000 for each of the fiscal years ending September 30, 1979, September 30, 1980, and September 30, 1981."

Sec. 2. Section 110(c) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1380(c)), is amended by adding at the end thereof the following new paragraphs:

"(4)(A) $1,300,000 which shall be available to the Secretary of the Interior for the fiscal year ending September 30, 1979.

"(B) $1,600,000 which shall be available to the Secretary of Commerce for the fiscal year ending September 30, 1979.

"(5)(A) $1,500,000 which shall be available to the Secretary of the Interior for the fiscal year ending September 30, 1980.

"(B) $2,000,000 which shall be available to the Secretary of Commerce for the fiscal year ending September 30, 1980.

PURPOSE OF THE LEGISLATION

The purpose of H.R. 10730 is to authorize appropriations for fiscal years 1979, 1980 and 1981 to carry out the Marine Mammal Protection Act of 1972.

LEGISLATIVE BACKGROUND

H.R. 10730 was introduced on February 2, 1978, by Mr. Murphy of New York and cosponsored by Mr. Leggett, Mr. Ruppe, Mr. Biaggi, Mr. Anderson of California, Mr. Forsythe, Mr. de la Garza, Mr. Metcalf, Mr. McCloskey, Mr. Breaux, Mr. Ginn, Mr. Pritchard, Mr. Studds, Mr. Bowen, Mr. Lent, Mr. de Lugo, Mr. Hubbard, Mr. Emery, Mr. Bonker, Mr. AuCoin, Mr. Bauman, Mr. D'Amours, Mr. Patterson of California, Mr. Zeferetti, and Mr. Oberstar. An identical bill, H.R. 10731, was introduced on February 2, 1978, by Mr. Murphy of New York, and cosponsored by Mr. Akaka, Mr. Trible, and Ms. Mikulski.

The Subcommittee on Fisheries and Wildlife Conservation and the Environment held hearings on the legislation on February 7, 1978. The subcommittee received testimony from representatives of the Department of Commerce, Department of the Interior, Marine Mammal Commission, Defenders of Wildlife, Monitor, Inc., and the Society for Animal Protective Legislation.

All the witnesses appearing before the Subcommittee expressed their strong support for extending the authorization of appropriations under the act. The Department of Commerce witness suggested an authorization of $6.748 million for fiscal year 1979 and such sums as may be necessary for fiscal year 1980. The Department of the Interior witness suggested an authorization level of $1.6 million for fiscal year 1979

and such sums as may be necessary for fiscal year 1980. Representatives of the conservation groups supported the legislation, although they expressed their strong support for increasing the funding for enforcement activities under the act.

The witness for the Marine Mammal Commission testified that the Commission supported an authorization level of $800,000.

The subcommittee gave careful consideration to the evidence presented at the hearings and the Departmental reports. On March 14, 1978, the subcommittee unanimously ordered H.R. 10730 reported to the full committee with an amendment. The amendment adopted by the subcommittee, which was accomplished by striking out all after the enacting clause and substituting new language, would accomplish the following:

Authorize appropriations of $400,000 to the Department of the Interior under section 109 for each of fiscal years 1979, 1980, and 1981;

Authorize appropriations of $225,000 to the Department of Commerce under section 109 for each of fiscal years 1979, 1980, and 1981;

Authorize appropriations of $1.3 million for fiscal year 1979, $1.5 million for fiscal year 1980, and $2.1 million for fiscal year 1981 to enable the Department of the Interior to carry out its responsibilities under section 110;

Authorize appropriations of $1.6 million for fiscal year 1979, $2.0 million for fiscal year 1980, and $2.5 million for fiscal year 1981 to enable the Department of Commerce to carry out its responsibilities under section 110;

Authorize appropriations of $8.5 million for fiscal year 1979, $9.0 million for fiscal year 1980, and $9.5 million for fiscal year 1981 to the Department of Commerce under section 114;

Authorize appropriations of $650,000 for fiscal year 1979, $760,000 for fiscal year 1980, and $876,000 for fiscal year 1981 to the Department of the Interior under section 114; and

Authorize appropriations to the Marine Mammal Commission under section 207 of $1.0 million for each of fiscal years 1979, 1980 and 1981.

The Committee on Merchant Marine and Fisheries unanimously ordered reported H.R. 10730, as amended, to the House on March 16, 1978.

BACKGROUND AND NEED FOR THE LEGISLATION

The Marine Mammal Protection Act was enacted in 1972 for the purpose of insuring that marine mammals do not diminish below their optimum sustainable population. In passing the act, Congress responded to the growing concern about man's impact on marine mammals such as whales, dolphins, seals, sea otters, polar bears, and manatees.

The act directed the Secretary of the Interior and the Secretary of Commerce to establish general limitations on the taking of all marine mammals. Criminal and civil penalties are prescribed for violations of the act and the importation of marine mammals and their products is subject to regulation. The act created a three-member Marine Mammal Commission which is charged with the

responsibility of monitoring the implementation of the act, recommending policies to the two secretaries, and undertaking such research as is deemed appropriate.

Since passage of the act, the agencies have engaged in a wide variety of research and management activities dealing with marine mammals. The Department of Commerce, which has responsibility for whales, dolphins, sea lions, and seals, is currently engaged in research designed to provide information on the population status of several of these species as well as their relationship to their ecosystems.

The Department of the Interior, which is vested with the responsibility for polar bears, walruses, sea otters, manatees, and dugongs, is currently engaged in a number of projects designed to provide essential biological data on these species. Current studies of community interactions and ecosystem functions of marine mammals will expand into modeling approaches that will allow scientists to predict what will happen to these species under given circumstances. A number of research projects being conducted by both Departments are aimed at developing solutions to specific marine mammal problems. The current research and development activities are a continuation of a successful program under the act.

A list of the major accomplishments under the Marine Mammal Protection Act of 1972 includes the following:

The development of dolphin-saving tuna nets which have been a major factor in reducing the level of dolphin mortality incidental to commercial fishing operations.

Research on the behavior of dolphins in tuna nets. This effort led to several modifications of fishing techniques which further reduced incidental dolphin mortality.

The completion of several experimental cruises to determine additional methods of reducing incidental dolphin mortality. This program is a cooperative effort with the U.S. tuna industry which financed the cost of providing a dedicated research vessel.

Biological research on the endangered Florida manatee.

The establishment of a joint United States-U.S.S.R. marine mammal research program which has focused primarily on the distribution and behavior of polar bears.

Studies of the interaction between marine mammals and commercially harvested fish.

Research on the impact of oil spills, in particular the Nantucket oil spill, on marine mammals.

Research which led to the listing of the Hawaiian monk seal as endangered and the development of a program to protect the species.

The development of care and maintenance standards for marine mammals held in captivity.

Research on the population status of whales which provided the biological data leading to a substantial reduction in the international harvest of whales.

The development of information on the impact of development activities on the lagoons where gray whales breed.

Research on the population status of killer whales in Puget Sound. This effort led to the development of a radio tracking system which has greatly assisted scientists in determining the migration patterns and population size of marine mammals.

In addition to the specific accomplishments noted above, the Marine Mammal Protection Act has focused national attention on the need to protect and conserve marine mammals. Research conducted under the act has often provided the first detailed information on the population status of marine mammals. This expanded knowledge has enabled us to better assess the impact of various ocean-related development activities on marine mammals. An understanding of these impacts and of the relationship of marine mammals to their ecosystem permits the development of programs to ensure that these species remain a functioning part of their ecosystem. H.R. 10730 will permit a continuation of this important work.

H.R. 10730, as amended, establishes a line item authorization under section 109 of the act. Section 109 authorizes matching grants to states which have adopted approved management programs for marine mammals under their jurisdiction. The committee feels that insufficient attention has been given to the needs of these states. The authorization provided in H.R. 10730 reflects information received from California, Alaska, and Florida regarding the nature and extent of their needs for marine mammal funds. The State of Alaska indicated to the committee that it will seek section 109 matching funds of $204,800 for the management of sea otters, walruses, and polar bears. The State of California indicated to the committee that it will seek matching funds of $125,000 for the management of sea otters and marine mammal enforcement activities. The State of Florida indicated to the committee that it will seek matching funds of $75,000 for the management of manatees.

H.R. 10730, as amended, authorizes appropriations to the Departments of the Interior and Commerce under section 110 of the act. Section 110 authorizes these departments to make grants to Federal and State agencies, public or private institutions, or other individuals to perform research relevant to the protection and conservation of marine mammals. The authorizations figures in H.R. 10730, as amended, differ substantially from the amounts requested by the Administration under section 110. The Department of Commerce did not request any funding under section 110, preferring to have all of its authorization included under section 114. However, placement of all research funding under section 114 has lead [sic] to a substantial amount of research being done in-house. The committee feels that inadequate attention has been given by the Department of Commerce to the expertise available outside of the Department. In addition, by funneling its entire research program through section 114, the Department is able to avoid the requirement contained in section 110 that all outside research contracts be reviewed by the Marine Mammal Commission. H.R. 10730, as amended, makes it clear that all research grants that are contracted to agencies and individuals outside the Department of Commerce should be funded under section 110 and subject to review by the Marine Mammal Commission. The authorization levels provided in H.R. 10730 for the Department of Commerce under section 110 reflect information received from states as to their anticipated marine mammal research needs, as well as information provided by the Department of Commerce on significant unfunded research programs.

The Department of Commerce indicated to the committee that normally 25 percent of its research funds are contracted to institutions and individuals outside the Department of Commerce. The section 110 authorization in H.R. 10730, as amended, includes 25 percent

of the research funds in the Administration's fiscal year 1979 marine mammal budget which had been requested under section 114. It also includes 25 percent of the funds for projects which would not be funded in the Department's request but which the Committee feels should receive funding. These projects include:

East Coast whale research.—Many species of great whales, notably the humpback whale, the bryde's whale, the fin whale, and the sperm whale, are found along th [sic] east coast of the United States. Unfortunately, little is known about the migration patterns of these species. Without baseline biological data, the Department of Commerce is unable to adequately assess the impact of activities such as oil exploration and ocean dumping on these whale populations.

Bottlenose dolphin research.—Since the passage of the Marine Mammal Protection Act, approximately 25 bottlenose dolphins per year have been taken for public display facilities. Although available data suggests this level of taking constitutes no threat to the existing population, additional data is necessary to confirm that belief. In certain locations, the population of bottlenose dolphins has fallen dramatically, although the overall population has remained high. The reason for these sudden declines in the population is not known. To prevent further decline and to prevent similar declines in other areas, it is necessary to establish a comprehensive program for gathering baseline biological data.

Dall porpoise research.—Foreign fishing vessels operating within the United States' 200-mile fishing zone are taking marine mammals incidental to fishing operations. The Marine Mammal Commission estimates that prior to the passage of the Fishery Conservation Management Act of 1976 (FCMA) approximately 10,000 to 20,000 porpoises were taken incidental to Japanese fishing operations in the northern Pacific alone. The Marine Mammal Protection Act, as amended by the FCMA, requires that these countries obtain a permit to take these species. Before a permit can be granted, the Secretary of Commerce must find that the taking will not be to the disadvantage of the species involved. Last year the Government of Japan applied for a marine mammal permit but their application was rejected on the grounds that the Secretary lacked the data with which to make the necessary findings under the Marine Mammal Protection Act. The Department of Commerce has not requested any funds to accomplish the needed research on this and other species which are taken incidentally by foreign fishermen operating in the United States' 200-mile zone.

Marine mammal strandings. In recent years, there has been a substantial number of strandings of marine mammals. These strandings offer the opportunity for scientists to engage in opportunistic research. Because of budgetary restraints, many research institutions are unable to respond to such opportunities.

United States/Mexico whale and seal research. Numerous marine mammal species—including the gray whale, the Guadalupe fur seal and the elephant seal—inhabit the waters off the United States and Mexico. The Department of Commerce's fiscal year 1979 budget request provides inadequate funding for

research on these species. There is a pressing need for basic baseline biological data without which the U.S. and Mexico will not be able to evaluate the impact of offshore activities on these species.

The Department of the Interior requested an authorization of $1 million for section 110 research. The authorization level provided in H.R. 10730, as amended, includes this amount as well as the amount necessary for additional significant unfunded research on the endangered manatee.

H.R. 10730 also authorizes appropriations to the Department of the Interior and the Department of Commerce under section 114 of the Act. Section 114 authorizes appropriations to these Departments to carry out their responsibilities under the Act. These responsibilities include administration of the Act, enforcement efforts, as well as research and management programs other than those funded under section 109 or 110. The authorization levels provided in H.R. 10730, as amended, reflect the amounts requested by the Departments as well as the amounts necessary to fund the significant unfunded research programs mentioned above. In addition, the Committee has provided an additional $600,000 for research on the marine mammals of the Antarctic Ocean. With the pending negotiation of a treaty for the conservation of the living marine resources of the Antarctic, it is critical that the United States expand its research efforts on the population status of these species. The Section 114 funding level for the Department of Commerce also includes an increase of $1.2 million for general enforcement of the Act and $500,000 for enforcement of regulations governing the taking of bowhead whales by Alaskan natives. Finally, the committee has provided $400,000 per year under section 114 for the Department of Commerce to fund the U.S. share of the international observer program sponsored by the Inter-American Tropical Tuna Commission. This program provides for the placement of observers on vessels of other nations which are taking dolphins incidental to commercial tuna fishing. Although the U.S. agreed to the international observer program last fall, it has not yet provided its share of funding for the program.

Section 207 of the Marine Mammal Protection Act authorizes appropriations to the Marine Mammal Commission. H.R. 10730 authorizes appropriations of $1 million to the Commission for each of fiscal years 1979, 1980 and 1981. The fiscal year 1979 authorization level in the bill is $300,000 more than recommended by the Administration.

The Administration over the last few years has been attempting to reduce the funding for the Marine Mammal Commission. The Committee strongly feels that the Commission has played a major role in the resolution of several marine mammal controversies, and that the Commission should continue to be fully funded. If the Commission's budget is reduced from the existing $900,000 level, the Commission's important contribution to marine mammal research will be significantly reduced. An authorization of $1 million for each year would provide $488,000 for research in fiscal year 1979 and $457,000 for research in fiscal year 1980. These sums are adequate to maintain a strong and useful research program within the Commission.

The committee notes that the Marine Mammal Commission has played a valuable role in resolving the tuna-dolphin program by providing important research funding. In 1976 the Commission invested

approximately $200,000 of Commission funds toward tuna-dolphin research. Most of these funds were spent on an experimental research cruise which is attributed to developing dolphin-saving fishing technology. The committee is concerned that if the Commission's budget is reduced, as has been recommended by the Administration, the Commission will not be able to finance important research on pressing marine mammal problems.

The following chart describes the authorizations and appropriations under the Marine Mammal Protection Act for fiscal years 1974–78, as well as the authorization level provided in H.E. [sic] 10730 as introduced.

MARINE MAMMAL PROTECTION ACT—AUTHORIZATIONS AND APPROPRIATIONS

[Fiscal years]

Agency	1974		1975		1976		1977	
	Authorization	Appropriation	Authorization	Appropriation	Authorization	Appropriation	Authorization	Appropriation
Interior Department								
Sec. 110 (Research)	$833,000	$833,000	$833,000	$833,000	$833,000	$833,000	$833,000	$833,000
Sec. 114 (Adminstration)	525,000	525,000	525,000	525,000	525,000	525,000	525,000	525,000
Commerce Department								
Sec. 110 (Research)	1,666,667	0	1,666,667	700,000	1,666,667	1,100,000	1,666,667	1,666,667
Sec. 114 (Administration)	2,000,000	986,000	2,000,000	350,000	2,000,000	1,382,000	2,000,000	2,778,000
Marine Mammal Commission: Sec.207	825,000	412,000	1,000,000	750,000	1,000,000	900,000	1,000,000	1,000,000

MARINE MAMMAL PROTECTION ACT—AUTHORIZATIONS AND APPROPRIATIONS—Continued

Agency	Fiscal year 1978		H.R. 10703 as introduced in each of 1979, 1980, 1981	H.R. 19730, as amended			
	Authorization	Appropriation		Section	1979	1980	1981
Interior Department:				109	$400,000	$400,000	$400,000
Sec. 110 (Research)	$1,200,000	$950,000	$933,000	110	1,300,000	1,500,000	2,100,000
Sec. 114 (Administration)	850,000	589,000	425,000	114	650,000	760,000	876,000
Commerce Department:				109	225,000	225,000	225,000
Sec. 110 (Research)	200,000	*0	200,000	110	1,600,000	2,000,000	2,500,000
Sec. 114 (Administration)	11,500,000	4,872,000	6,162,000	114	8,500,000	9,000,000	9,500,000
Marine Mammal Commission: Sec. 207	2,000,000	900,000	702,000	107	1,000,000	1,000,000	1,000,000

*Commerce Department requested all appropriations be included under Sec. 114 and the entire amount of $4,872,000 was appropriated under that section.

SECTION-BY-SECTION ANALYSIS

There follows a section-by-section summary of H.R. 10730, as amended, accompanied by discussion where appropriate.

Section 1

Section 1 of the legislation would authorize $400,000 to the Department of the Interior for each of fiscal years 1979, 1980, and 1981 to carry out its functions under section 109 of the act. This section would also authorize $225,000 to the Department of Commerce to carry out its responsibilities under section 109 in each of fiscal years 1979, 1980 an [sic] 1981.

Section 109 of the Marine Mammal Protection Act authorizes the Departments of the Interior and Commerce to provide matching grants to states which have resumed management of marine mammals under the act.

Section 2

Section 2 of the legislation would authorize appropriations to the Secretary of the Interior under section 110 of $1,300,000 in fiscal year 1979, $1,500,000 in fiscal year 1980 and $2,100,000 in fiscal year 1981. This section would also authorize to the Secretary of Commerce under section 110 $1,600,000 in fiscal year 1979, $2,000,000 in fiscal year 1980 and $2,500,000 in fiscal year 1981.

Section 110 of the Marine Mammal Protection Act authorizes the Secretaries of the Interior and Commerce to make grants or to provide financial assistance to any Federal or state agency, public or private institution, or other persons for the purpose of assisting such agency, institution, or person to undertake research in subjects which are relevant to the protection and conservation of marine mammals.

Section 3

Section 3 of the legislation would authorize to the Department of Commerce under section 114 of the act $8,500,000 in fiscal year 1979, $9,000,000 in fiscal year 1980, and $9,500,000 in fiscal year 1981. Section 3 would also authorize to the Department of the Interior to carry out its responsibilities under section 114 of the act $650,000 in fiscal year 1979, $760,000 in fiscal year 1980, and $876,000 in fiscal year 1981.

Section 114 provides funds to the Secretary of the Interior and the Secretary of Commerce to conduct research not provided for in Section 110 and to administer and enforce the act.

Section 4

Section 4 of the legislation would authorize to be appropriated to the Marine Mammal Commission $1,000,000 under section 207 in each of fiscal years 1979, 1980, and 1981 to carry out the Commission's responsibilities under the act.

COST OF THE LEGISLATION

In the event the legislation is enacted into law and money authorized are fully appropriated, the Committee estimates the maximum cost to the Federal Government (after considering the information supplied by the Government agencies and their representatives and the Con-

gressional Budget Office) for the 3-year extension of the act would be $13.675 million for fiscal year 1979, $14.885 million for fiscal year 1980, and $16.601 million for fiscal year 1981.

Calendar No. 818

95TH CONGRESS
2d Session

SENATE

REPORT
No. 95–888

MARINE MAMMAL PROTECTION ACT AUTHORIZATION

MAY 15 (legislative day, APRIL 24), 1978.—Ordered to be printed

Mr. CANNON, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany H.R. 10730]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (H.R. 10730), to authorize appropriations to carry out the Marine Mammal Protection Act of 1972 during fiscal years 1979, 1980, and 1981, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

The purpose of H.R. 10730, as amended, is to extend the authorization period for the Marine Mammal Protection Act of 1972 through fiscal years 1979, 1980, and 1981, and to increase the authorization levels under the act.

BACKGROUND AND NEEDS

Background

The Marine Mammal Protection Act was enacted in 1972 to provide increased protection to marine mammals found within U.S. jurisdiction; to restrict the importation and taking of marine mammals; and to create the Marine Mammal Commission to do research and review agency actions under the act. In passing the act, Congress responded to the growing concern about man's impact on marine mammals which include whales, porpoises, seals, sea otters, polar bears, and manatees.

The act gave to the Secretaries of Interior and Commerce the authority and direction to establish general limitations upon the taking of all marine mammals, and within those limitations, to issue permits for their taking. Criminal and civil penalties are prescribed for viola-

tions of the act, and the importation of marine mammals and their products is subject to regulation. The act created a three member Marine Mammal Commission which is charged with responsibility for monitoring the implementation of the act, recommending policies to the two Secretaries, and undertaking such research as is deemed appropriate.

Since the passage of the act, the agencies have engaged in a wide variety of research and management activities dealing with marine mammals. The Department of Commerce is currently engaged in research on competition between marine mammals and fishermen for fishery resources, incidental catch of marine mammals in fisheries other than the yellowfin tuna fishery, and the size and migration patterns of bowhead whale off the North Slope of Alaska. The Department of Commerce is continuing its research and regulatory efforts with regard to the tuna-porpoise problem. Significant progress has been made in this area with the cooperation and support of the tuna industry and the Marine Mammal Commission. The incidental take of porpoise recently has dropped to 0.25 animals per ton of yellowfin tuna caught on porpoise. In the first 4 months of this year, that has decreased further to 0.24 animals per ton.

The Department of the Interior is currently engaged in extensive research on polar bear distribution, den location, and environment. Two distinct populations of sea otters, those in California and Alaska, are being studied in regard to community studies, with particular emphasis in the California population on the shellfish-sea otter relationship. Although management of the Pacific walrus has been returned to the State of Alaska, the Fish and Wildlife Service is continuing to cooperate with the State in its research program.

The state of the manatee population in Florida has been of special concern to the Fish and Wildlife Service, which has continued the research into the distribution of the population and environmental conditions, and stepped up enforcement, in cooperation with the State of Florida, to provide protection for this endangered species from motorboat traffic in protected areas. Research is underway in cooperation with the Florida Power and Light Co. on the influence of warm water effluents from powerplants. Areas which receive these effluents seem to be effecting a change of winter population distribution of the manatee, with mortality connected with a drop in water temperature when the warm water effluents are reduced in correspondence with the power output requirements from the plants.

The Department of the Interior is involved internationally in cooperative efforts with the Soviet Union on polar bears, in implementing the five-nation agreement on the Conservation of Polar Bears for the United States, with population and distribution studies of the dugong, and in cooperative efforts with Mexico to examine the status of manatees.

The Marine Mammal Commission has been involved in a wide variety of activities affecting the protection of marine mammals both domestically and internationally. In 1977 the Commission supported more than $500.000 [sic] in research and studies concerning marine mammals. In regard to the tuna-porpoise controversy, the commission helped to develop a project, in cooperation with the Department of

Commerce and the U.S. Tuna Foundation for utilization of a dedicated research vessel provided by the tuna industry. In addition to these activities, the commission reviewed research efforts of Federal agencies, and made a series of recommendations on a variety of actions affecting marine mammals, such as cooperative research and conservation agreements with Mexico, Alaska's request to waive the moratorium on nine marine mammal species, and permit applications to take marine mammals for scientific research and public display.

Committee Action

H.R. 10730 was passed by the House on April 10, 1978. The Committee on Commerce, Science, and Transportation held a full committee hearing on the bill on May 3, 1978. The committee received testimony from representatives of the Department of Commerce, Department of the Interior, Marine Mammal Commission, Monitor, Inc., and Defenders of Wildlife.

All the witnesses appearing before the committee expressed their strong support for extending the authorization of appropriations under the act. The hearing examined in some detail whether the authorization levels requested by the administration and those contained in H.R. 10730 would be adequate to maintain the level of research, policy development, and enforcement envisioned by the act. This point was stressed in regard to the Marine Mammal Commission authorization. The committee feels that the authorization level requested by the Administration is too low to permit the commission to continue to provide policy review of the activities of the Federal agencies, and continue research projects on a need basis, which are intended to be taken over by the departments as their efforts gain more comprehensiveness. For these reasons, the committee feels that the authorization level proposed in H.R. 10730 of $1 million for each of the next 3 fiscal years is much more realistic in terms of the variety of tasks which the Marine Mammal Commission is responsive [sic] for carrying out than is the administration request.

Under section 109, the Secretaries of Commerce and Interior may make grants to States to develop and implement management plans for the purpose of marine mammal management if the Secretaries determine that State laws and regulations are in keeping with the policies of the act. These grants can provide up to 50 percent of the cost. In the past, this segment of the act has not received a separate authorization. The bill provides for an authorization under section 109, and the committee believes that this is a necessary and wise step to assist those States with the capability to assume management responsibilities.

In the committee's review of the Marine Mammal Protection Act, particular attention has been given to the bowhead whale controversy involving subsistence hunting of this species by Alaskan Natives. The Department of Commerce currently has underway a comprehensive research and monitoring effort in Alaska in response to concerns voiced by the International Whaling Commission (IWC) concerning the status of the bowhead population, and the Alaskan Natives concerning the cultural and nutritional needs to continue the hunt. As a result of a quota for taking of bowheads applied by the IWC in

December 1977, and a ruling by the Department of Commerce, the hunt is being limited to 12 landed or 18 struck, whichever occurs first. The major basis for the controversy has been incomplete data on population levels of the bowhead whale. In light of this, the committee recommends additional funding under section 110 for the Department of Commerce to be utilized for research and monitoring of this species. The committee amended H.R. 10730 to raise the levels of authorization of appropriations for each of the next 3 fiscal years to $2,700,000, from levels of $1,600,000 for fiscal year 1979, $2,000,000 for fiscal year 1980, and $2,500,000 for fiscal year 1981.

ESTIMATED COSTS BY THE CONGRESSIONAL BUDGET OFFICE

Pursuant to section 403 of the Congressional Budget Act of 1974, the following estimate of costs was prepared by the Director of the Congressional Budget Office:

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., May 10, 1978.

Hon. HOWARD W. CANNON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, 5202 Dirksen Senate Office Building, Washington, D.C. 20510

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 10730, a bill to authorize appropriations to carry out the Marine Mammal Protection Act of 1972 during fiscal years 1979, 1980, and 1981.

Should the committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN,
Director.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

MAY 10, 1978.

1. Bill Number: H.R. 10730.
2. Bill Title: A bill to authorize appropriations to carry out the Marine Mammal Protection Act of 1972 during fiscal years 1979, 1980, and 1981.
3. Bill Status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation May 9, 1978.
4. Bill Purpose: The purpose of this bill is to authorize appropriations to carry out the provisions of the Marine Mammal Protection Act of 1972 for fiscal years 1979, 1980, and 1981. Funds are specifically authorized to both the Department of Commerce and the Department of the Interior to make grants under sections 109 and 110 of the 1972 Act. Additional funds are provided to both Departments to carry out all other general conservation and protection activities provided by the original law.

5. Cost Estimate:

	Millions
Fiscal year 1979:	
Authorization level	$14.8
Estimated cost	12.5
Fiscal year 1980:	
Authorization level	15.6
Estimated cost	15.4
Fiscal year 1981:	
Authorization level	16.8
Estimated cost	16.7
Fiscal year 1982:	
Authorization level	- - -
Estimated cost	2.4
Fiscal year 1983:	
Authorization level	- - -
Estimated cost	.2

The cost of this bill fall within budget function 300.

6. Basis of estimate: The authorization levels are those stated in the bill. It is assumed that this bill and the subsequent appropriation required for 1979 will be passed before the beginning of fiscal year 1979 and the appropriations for 1980 and 1981 will be made before the beginning of each fiscal year. The rates at which outlays would be made from these authorizations were estimated after consultation with the Departments of Commerce and Interior and with the Marine Mammal Commission. With two exceptions they are based on historical spendout patterns for the respective activities. Exceptions were made in the cases of section 109 and section 110 authorizations for the Department of Commerce for 1979, 1980, and 1981.

The section 109 authorization represents requirements for a new grant to the State of Alaska, all of which is expected to be spent in the year it is appropriated. The 1979 authorization for section 110 of $2.7 million represents a substantial increase in funds allocated specifically for grants for research and since the Department has had very little experience with this kind of grant it was impossible to use historical trends. Therefore, the spendout rate used for this estimate was based on the assumption that these funds would be obligated through contracts to outside researchers, and spent at a rate of 60 percent the first year, 35 percent the second year, and 2 percent the third year.

7. Estimate Comparison: None.
8. Previous CBO Estimate: On March 20, 1978, CBO prepared a cost estimate for H.R. 10730, as ordered reported by the House Committee on Merchant Marine and Fisheries. That bill included lower authorization levels for section 110 activities.
9. Estimate Prepared by: Susan Cirillo.
10. Estimate Approved by:

JAMES L. BLUM,
Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 5 of rule XXIX of the Standing Rules of the Senate, the committee states that the Marine Mammal Protection Act of 1972 contains a comprehensive regulatory program aimed at protecting marine mammals. This bill, H.R. 10730, as amended, would neither add to nor subtract from that body of regulations.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 authorizes to the Department of the Interior $400,000 for each of fiscal years 1979, 1980, and 1981 to carry out functions under section 190 of the act. The Department of Commerce is authorized $225,000 for the same purpose for each of the next 3 fiscal years.

Section 109 authorizes the two Departments to provide matching grants to States which have resumed management of marine mammals under the act.

Section 2

Section 2 authorizes to the Secretary of the Interior appropriations of $1,300,000 for fiscal year 1979, $1,500,000 for fiscal year 1980, and $2,100,000 for fiscal year 1981 to carry out responsibilities under section 110 of the act. The Secretary of Commerce is authorized appropriations of $2,700,000 for the same purpose for each of the next 3 fiscal years.

Section 110 authorizes the Secretaries of Commerce and the Interior to make grants or provide financial assistance to any Federal or State agency, public or private institution, or other person to undertake research in subjects which are relevant to the protection and conservation of marine mammals.

Section 3

Section 3 authorizes to the Department of Commerce appropriations of $8,500,000 for fiscal year 1979, $9,000,000 for fiscal year 1980, and $9,500,000 for fiscal year 1981 to carry out responsibilities under section 114 of the act. The Department of the Interior is authorized $650,000 for fiscal year 1979, $760,000 for fiscal year 1980, and $876,000 for fiscal year 1981 for the same purpose.

Section 114 of the act provides funds to the Secretaries of Commerce and the Interior to administer and enforce the act, as well as for research which cannot be accommodated under section 110.

Section 4

Section 4 authorizes to the Marine Mammal Commission appropriations of $1 million under section 207 for each of fiscal years 1979, 1980, and 1981 to carry out the Commission's responsibilities under the act.

LEGISLATIVE HISTORY

H.R. 10730 was considered by the Committee on Commerce, Science, and Transportation on May 9, 1978, and was ordered favorably reported with an amendment in the nature of a substitute.

97TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 97–228

MARINE MAMMAL PROTECTION ACT AMENDMENT

SEPTEMBER 16, 1981.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. JONES of North Carolina, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H.R. 4084]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 4084) to improve the operation of the Marine Mammal Protection Act of 1972, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert the following:

SECTION 1. OPTIMUM SUSTAINABLE POPULATION.

(a) BASIC AMENDMENT.—Paragraph (8) of section 3 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362(8)) (which Act shall hereafter in this Act be referred to as the "Act of 1972") is repealed.

(b) CONFORMING AMENDMENTS.—(1) Section 2(6) of the Act of 1972 (16 U.S.C. 1361(6)) is amended by striking out "optimum carrying capacity" and inserting in lieu thereof "carrying capacity".

(2) Section 3 of the Act of 1972 (16 U.S.C. 1362) is further amended—

(A) by amending paragraph (1) to read as follows:

"(1) The term 'depletion' or 'depleted' means any case in which—

"(A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under title II of this Act, determines that a species or population stock is below its optimum sustainable population;

"(B) a State, to which authority for the conservation and management of a species or population stock is transferred under section 109, determines that such species or stock is below its optimum sustainable population; or

"(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973.";

(B) by striking out "the optimum carrying capacity of their habitat" in paragraph (2) and inserting in lieu thereof "their optimum sustainable population";

(C) by redesignating paragraphs (9) through (15) as paragraphs (8) through (14), respectively;

Legislative History

During hearings in April on H.R. 2948, providing the Fiscal Year 1982 authorization of appropriations for the Marine Mammal Protection Act, the Subcommittee on Fisheries and Wildlife Conservation and the Environment heard testimony from several witnesses advocating amendments to the Act. In May 1981, the Committee reported H.R. 2948 to the House but stated its intention to hold additional hearings in an attempt to develop solutions to the problems addressed by witnesses and to remedy certain problems which make administration of the Act difficult.

As a result of the April authorization hearings and the Committee's commitment to develop an amendment package which would be reported to the Floor of the House before the end of the First Session of the 97th Congress, Mr. Breaux and Mr. Forsythe introduced H.R. 4084 on July 9, 1981, for the purpose of improving the operation of the Marine Mammal Protection Act and extending the authorization of appropriations through Fiscal Year 1984.

On July 13, the Subcommittee on Fisheries and Wildlife Conservation and the Environment held hearings on the legislation. Testimony was received from the fishing industry, the Alaska Federation of Natives, state fish and game agencies, the fur industry, the oil and gas industry, representatives of the environmental and conservation community, the Departments of Commerce and the Interior, and the Marine Mammal Commission.

After giving careful consideration to the evidence presented at the hearing, the Subcommittee, on July 21, unanimously ordered H.R. 4084 reported, with an amendment, to the Full Committee. On July 31, 1981, the Committee on Merchant Marine and Fisheries, by voice vote, unanimously ordered H.R. 4084 reported to the House with an amendment.

The Amendment

The amendment to H.R. 4084 was accomplished by striking out all after the enacting clause and inserting new language. The amendment:

Deletes the definition of "optimum carrying capacity", since it is indistinguishable from optimum sustainable population (OSP) and because both are used interchangeably throughout the Act. Wherever "optimum carrying capacity" appears it is replaced with "carrying capacity".

Redefines the term "depleted" to mean any case in which the Secretary, or a State to which management authority has been returned, determines that a species or population stock is below its OSP, or is listed as endangered or threatened under the Endangered Species Act.

Retains the Act's goal of reducing the incidental taking of marine mammals pursuant to commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate but clarifies that this goal shall be satisfied in the case of purse seine fishing for yellowfin tuna by "a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable".

Directs the Secretary to allow the incidental, but not the intentional, taking by U.S. non-tuna commercial fishermen of small numbers of marine mammals if (1) the population is not depleted, (2) the total of such taking will have a negligible impact on the stock, and (3) there is a system established among the fishermen for monitoring such taking. The Secretary must withdraw the permission to take marine mammals under this section if he finds that the take is having more than a negligible impact on the species or that the policies, purposes and goals of the Act would be better served through implementation of the other sections of the Act.

Directs the Secretary to allow the taking of small numbers of a non-depleted species by U.S. citizens who engage in specified activities (other than commercial fishing) within specified geographical areas, if he (1) finds that the total of such taking will have a negligible impact on the species, on its habitat, and on the availability of such species for subsistence uses in Alaska, and (2) prescribes regulations which set forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species or its habitat (with particular attention given to rookeries, mating grounds, and other areas of significance) and which set out the requirements for monitoring and reporting the takings. The Secretary must withdraw his permission to take marine mammals pursuant to this section if the regulations are not substantially complied with or if he finds such taking is having more than a negligible impact on the species concerned.

Makes it unlawful for any person to transport, purchase, sell or offer to purchase or sell any marine mammal or marine mammal product unless otherwise provided under the Act.

Authorizes the Secretary to allow individuals to abandon marine mammal imports made for personal or family use to the enforcement officer at the port of entry without the individual going through a formal notice of violation and forfeiture proceeding.

Establishes a procedure to return marine mammal management to any state. The Secretary may transfer management authority to a state if the state has developed and will implement a program which: (1) is consistent with the purposes, policies and goals of the Act and with international treaty obligations: (2) requires that all taking be humane: (3) does not permit taking until the state determines (through a simplified hearing process) the OSP of the population and the maximum number of animals that may be taken without reducing the species below its OSP; (4)

provides procedures for acquiring data relating to the OSP of the species and the maximum allowable take and for amending the determinations made during the informal hearing process; (5) provides procedures for resolving the differences between the state and the Secretary which may arise regarding the allocation of the allowable take between the state and the Federal Government; and (6) provides for an annual report to the Secretary concerning the administration of the state program. The Secretary cannot transfer management authority to the State of Alaska unless the state has adopted a statute and regulations which insure that taking for subsistence will be the priority consumptive use of the species and that such taking will be accomplished in a nonwasteful manner. Any other consumptive uses—such as sport hunting—can be authorized only if it would not have an adverse effect on subsistence uses. During the interim period when the Secretary has transferred management authority to a state but before the state is able to implement its program, the Secretary would continue to regulate all takings of marine mammals within the state. Once the state is able to implement its program, the Secretary would still be responsible for regulating any takings in the 200-mile zone and all takings for scientific research or public display purposes in state and Federal waters.

Authorizes the Secretary to revoke the transfer of management authority for any species if the state does not implement its approved program or if the program is not being implemented consistently with the provisions of the state plan. Before the Secretary can revoke the transfer of management authority, he must first consult with the state and provide the state with the opportunity to take any remedial measures the Secretary considers necessary.

Permits the Secretary to prescribe marking, tagging and reporting requirements applicable to the subsistence take of Alaska natives at any time the state is not exercising management authority over the species concerned.

Expands the Secretary's authority to make grants to the states for developing their programs. Under existing provisions of the Act, such grants can only be made to administer the state program upon the transfer of management authority.

Adds a new sentence to the research section of the Act to direct the Secretary to undertake, and provide assistance for, research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals.

Authorizes to be appropriated $8.0 million in fiscal year 1983 and $8.8 million in fiscal year 1984 to the Department of Commerce, $1.76 million in fiscal year 1983 and $2.0 million in fiscal year 1984 to the Department of the Interior, and $1.0 million in fiscal year 1983 and $1.1 million in fiscal year 1984 to the Marine Mammal Commission to carry out their responsibilities under the Act.

For further details or clarification of the amendment, see the Section-By-Section Analysis.

Background and Need

The Marine Mammal Protection Act (MMPA) was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at healthy population levels. In passing the Act, Congress responded to the growing concern about the decline of certain species and recognized the important role that marine mammals play in the ecosystem as well as their economic, aesthetic and recreational value.

Under the MMPA the Department of Commerce is charged with responsibility for whales, dolphins (porpoises), sea lions and seals. The Department of the Interior has responsibility for polar bears, walruses, sea otters, manatees and dugongs. The Act establishes a moratorium on the taking of marine mammals unless the population of an animal is determined to be at its optimum sustainable level. State management of resident marine mammal populations is preempted until such time as a state prepares a marine mammal management program consistent with the Act. Criminal and civil penalties are prescribed for violations of the Act and the importation of marine mammals and their products is subject to regulation. The Act created a three-member Marine Mammal Commission which is charged with monitoring the implementation of the Act, recommending policies to the two Secretaries, and undertaking such research as is deemed appropriate.

In many respects, the Marine Mammal Protection Act has been a remarkably successful piece of legislation. In the area of reducing the incidental take of porpoises in tuna fishing operations, for example, the number of porpoises killed has dropped from an estimated 368,000 animals in 1972 to an estimated 15,303 porpoises in 1980. This dramatic accomplishment has been achieved because of improvements in gear design and fishing techniques. A number of other species, such as the California sea otter and the West Indian manatee, also seem to be benefiting from the protection provided pursuant to the Act. However, during hearings held on April 7, 1981, on legislation to reauthorize the MMPA, the Committee received testimony regarding a number of problems associated with the implementation and administration of the Act.

The most notable difficulty experienced in the administration of the Act occurred when the Departments of Commerce and the Interior attempted to return management of certain marine mammal species to the State of Alaska, as provided for in section 109 of the Act. On January 31, 1973, Alaska requested the Secretaries of Commerce and the Interior to grant a waiver of the moratorium to permit the hunting of nine species of marine mammals and to return management of the species to the state. Six of the species were under Commerce's jurisdiction and three were under Interior's jurisdiction. Pursuant to the Act, the state's request required formal hearings before an administrative law judge concerning the status of the population of each species, as well as consideration of the state's proposed laws and regulations that would govern the taking of that species. The proposed waiver of the moratorium to allow a taking of marine mammals also required compliance with the provisions of the National Environmental Policy Act.

The proceedings involving walrus are particularly instructive regarding the deficiency of the process under which management can be returned to a state. In December 1975, approximately three years after the state's initial request, the return of management of walrus was conditionally approved by the Department of the Interior. After the state made some changes in its laws and regulations affecting the management of walrus, final approval was granted in April of 1976.

Public hearings, as required under the MMPA, were held in June, July, and October 1976, to discuss returning management of the other eight species to the state. In June 1977, the administrative law judge who conducted the hearings recommended to both secretaries that management be returned to the state. About one and one-half years after the administrative law judge recommended returning management to the state, the two secretaries, under certain conditions, agreed to return management of the other eight species to the state.

In returning walrus management to the State of Alaska, the Secretary stipulated that the State could also regulate the subsistence harvest of walrus by Alaskan natives. The Act, however, specifically provides that Alaskan natives may take marine mammals for subsistence and native handicrafts without regulation if the taking is not wasteful and if the species is not depleted. The native people of Togiak, Alaska, brought suit in Federal District Court claiming that the state must guarantee the continued right of natives to take marine mammals and arguing that the Federal Government could not transfer management under the Act without such assurances. The Court held for the people of Togiak, stating that the Act preempts any state regulation of the native take. Because Alaska's constitution prohibits any discrimination among its citizens, the state could not comply with the Court's decision that the natives be given a preferred status with respect to the taking of marine mammals. The state returned management of walrus to the Federal Government in July, 1979, and retracted its request to manage the other marine mammal species.

It must be noted that during the period between 1973 and 1976, when the State of Alaska was awaiting approval of its request to have management of the walrus returned, the Fish and Wildlife Service did little to manage the walrus because the Service expected the state would soon resume management. Therefore, for a period of about four years after the Act was passed there was neither Federal nor state management of walrus. After the state returned walrus management to the Secretary, there was no effective management of this species because of the inadequate Federal resources which are devoted to marine mammal management and because the Federal Government has no authority to regulate the take of non-depleted marine mammals by Alaskan natives. The result is that the current population of walrus, estimated at 250,000, is considered by many scientists to be larger than its habitat can effectively support. From an ecological viewpoint, it is both unhealthy and environmentally destabilizing to have a population at a level higher than the relevant habitat can sustain. The lengthy process entailed in the return of management provisions of the Act, have, in the case of the walrus, resulted in a situation in which the goals of the Marine Mammal Protection Act—the maintenance of healthy populations of marine mammals—could not be met.

The conclusions reached by a recent General Accounting Office study of the Act clearly illustrate the extent of the problem. This study stated that:

> For the most part, marine mammal interest groups believe that the walrus management problems stem from the large walrus population which is having an adverse impact on the carrying capacity of the marine ecosystem . . . In January, 1973 the state of Alaska, desiring to continue its management of marine mammals, requested, under the provisions of MMPA, that a waiver of the moratorium on the taking of nine marine mammals (including the walrus) be granted and management be returned to it. Reaching a decision on this request has been a slow process and the end result is that some eight years after the state's request many of the problems and issues . . . remain unresolved. Admittedly, the waiver process is burdensome and, in the case of Alaska's request, was not made any easier with split Federal agency jurisdiction requiring review and formal hearings by two separate agencies . . . Because the Fish and Wildlife Service did little to manage the walrus while the state's request was pending (the Service assumed that the state would soon be granted management control), the walrus was not managed or controlled by either a Federal or state agency. The Federal agencies need to act faster on states' requests for a waiver on the taking of marine mammals and return of management.

The Committee concurs with the GAO conclusion and finds that one of the major reasons for the failure of Federal agencies to expedite action on state requests for return of management and waiver of the moratorium is the cumbersome procedures mandated under the Marine Mammal Protection Act which require extensive formal hearings. To remedy this problem and to ensure that effective conservation of management programs for marine mammals are implemented, H.R. 4084 establishes a simplified procedure under which a state could resume management of marine mammal species.

The Committee also received testimony that, despite the dramatic decline in the number of porpoises incidentally taken in tuna fishing operations, the administration of the provisions of the Act relating to incidental take have been characterized by excessive litigation. The tuna industry is operating in fear of being shut down by law suits, a fear which hampers investment in America's distant-water tuna fleet.

This fear is generated by those provisions of the Act which establish as the immediate goal of the Act that the incidental kill or serious injury of marine mammals pursuant to commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. It is the tuna industry's contention that so long as the industry is using the best economically and technologically feasible equipment and methods to reduce incidental porpoise mortality, the fleet can do no more. It has been argued by others, however, that zero mortality means precisely what it says and that the industry should be taking virtually no porpoises. The threat of litigation in this regard is of constant and continuing concern to the U.S. distant-

water tuna fleet. The tuna industry, which contributes approximately $1.2 billion annually to the gross national product, would be faced with severe economic consequences if a court interpreted the zero mortality goal in the strictest sense and failed to take into account the economic and technological practicability of achieving that goal.

Besides the aforementioned problems relating to the incidental take of porpoises in tuna fishing operations and the return of management to the states, the bill addresses several other major problems associated with the Act.

First, the Departments of Commerce and the Interior, the tuna industry, and the states raised questions concerning the definitions of "optimum sustainable population" (OSP), "optimum carrying capacity" (OCC), and "depleted". Under the Act, a species is said to be "depleted" if it has declined to a significant degree over a number of year [sic], is likely to become endangered, or is below the OCC of its environment. "OCC" means the ability of the habitat to support a species at its "OSP". However, OSP is defined as the level where the stock is reproducing at a maximum rate, based on the OCC for the species. The definitions are circular. Further, translating OCC and OSP into numbers requires estimates of population levels prior to commercial exploitation. Such calculations have demanded complex scientific analysis, postulating entirely unknown balances within a former marine ecosystem. It was alleged that these definitions are unworkable and must be replaced by more traditional management concepts and H.R. 4084 clarifies these definitions.

It was also brought to the Committee's attention that non-tuna commercial fishing operations and other activities which occur in areas occupied by marine mammals result in the take of some of these animals incidentally, although at a rate far below the level of tuna-porpoise mortalities. However, the same lengthy regulations requiring OSP determinations and permits which are applicable to the tuna industry also apply to activities involving small numbers of incidental takes. Only a fraction of non-tuna fishermen apply for a permit because of the cumbersome procedures required under the Act. The result has been a loss of data because most of these incidental takes go unreported. This symptom of "over management" has suggested the need for a two-tiered management scheme, distinguishing significant from insignificant takes, which is contained in H.R. 4084.

In addition to these major concerns, a number of more narrow, but equally important, issues were raised. For example, with regard to the take of marine mammals by Alaskan natives under the provisions of section 101 (b) of the Act, it is questionable whether the Federal agencies have the authority to monitor the harvest in order to provide the critical data needed in any management program. The increasing extent of the native harvest necessitates that adequate information on the nature of this harvest be available in order to monitor the impact of the harvest on marine mammal species. In the case of the walrus harvest, for example, all legal hunting is done by the natives. Any non-native harvest is illegal under the MMPA. Since the Act was passed in 1972 the number of walrus that the natives kill has increased significantly. From 1959 to 1971, an average of about 3,300 was taken each year. The current number is estimated at 10,000 a year. The

General Accounting Office, in its recent report on the Act, notes that a monitoring program would provide essential management data on the status and condition of the walrus population. Unfortunately, as noted above, it is less than clear under the existing Act whether the appropriate Federal agencies have the authority to monitor the nature and extent of the native take of marine mammals. In addition, it is feared that the prohibition section contains a loophole that will allow for the commercialization of marine mammal products by natives, which goes far beyond the obvious intent of the Act.

Another relatively narrow issue was raised by Federal officials who expressed concern because persons who unintentionally violate the import provisions of the Act are often required to go through civil penalty proceedings, when simply abandoning the item at the port of entry would provide a sufficient deterrent.

Finally, members of the scientific community requested broader authority to deal with stranded animals. All of these issues are addressed in the legislation.

H.R. 4048, as reported by the Committee, has the endorsement of the major industries affected by the Act and of the major environmental organizations concerned with the Act. The bill maintains the noble purpose of the Act to preserve strong, healthy populations of all marine mammals. At the same time it encourages greater state participation in marine mammal management and reduces the regulatory burden on those activities which have a minimal impact on marine mammals.

SECTION-BY-SECTION ANALYSIS

There follows a section-by-section analysis of H.R. 4084 accompanied, where appropriate, by additional discussion.

SECTION 1

Section 1 of H.R. 4084 amends Section 3 of the Act by deleting the definition of "optimum carrying capacity", amending the definition of "depleted", and making the conforming amendments required by these changes.

In deleting the term optimum carrying capacity, it is not the Committee's intent to substantively change the Act or to alter the meaning of, or methods by which, optimum sustainable population is calculated. Since the passage of the Act in 1972, there have been a number of workshops and conferences which have addressed scientific issues arising under the Act. At all of these meetings, scientists have treated the definition of optimum carrying capacity as interchangeable with the definition of optimum sustainable population. In fact, neither the regulations of the Fish and Wildlife Service nor those of the National Marine Fisheries Service define the term optimum carrying capacity. Further, in the first decision of the Administrator of the National Oceanic and Atmospheric Administration regarding the taking of marine mammals incidental to commercial fishing operations, the Administrator stated that:

> Optimum carrying capacity is a characteristic of the habitat. This term, however, is defined in the Act as the 'ability of

a given habitat to support the optimum sustainable population of a species or population stock in a healthy state without diminishing the ability of the habitat to continue that function.' Optimum sustainable population is defined in terms of the number of animals that may exist in a particular habitat. Therefore, I have concluded as a matter of law that a species or stock is below the habitat's optimum carrying capacity when the number of individuals is below the optimum sustainable population, and consequently is depleted.

The effect of the Administrator's decision, which has been followed by both agencies since 1977, is to make the term optimum carrying capacity essentially identical to the term optimum sustainable population.

Given this history, the Committee believed that the term optimum carrying capacity was unnecessary to the operation of the Act and could be deleted.

The definition of the terms "depleted" or "depletion" is amended to mean any case in which:

(1) The Secretary, or a State to which management authority is transferred under section 109, determines that a species is below its optimum sustainable population; or

(2) A species is listed as endangered or threatened pursuant to the Endangered Species Act of 1973.

The current definition of these terms is unclear in both language and purpose. The Committee believed that the adoption of a single management standard—the maintenance of species at their optimum sustainable population—was consistent with the Act and would reduce confusion. The Committee also recognized that species that are listed under the Endangered Species Act are, a fortiori, not at their optimum sustainable population and, therefore, should be considered depleted.

In drafting H.R. 4084, and the amendments thereto, the Committee gave serious consideration to amending the existing definition of optimum sustainable population. After carefully reviewing various alternative definitions proposed by the concerned parties, the Committee decided not to amend the definition. In reaching this decision, the Committee reviewed the current regulatory definition of optimum sustainable population contained in 50 CFR 216.3 and determined that, given the present state of scientific knowledge, this definition accurately reflects the meaning of the term optimum sustainable population and the intent of the Congress in passing the original Act. The Committee recognizes, however, that new scientific knowledge may result in changes to the existing regulatory definition.

Under the existing regulations, optimum sustainable population is any population level within a range of population levels. The upper bound of the range is the largest average supportable level within the ecosystem (carrying capacity). The lower bound of the range is the population level for a given species or stock that results in maximum net productivity.

SECTION 2

Section 101(a) (2) of the Act states that it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. Section 2 of H.R. 4084 amends section 101(a) (2) of the Act to provide that this goal is satisfied in the case of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.

In adopting this language, the Committee carefully considered the matter of the incidental taking of marine mammals in the course of commercial fishing operations and determined that the amendment to section 101(a) (2) is an appropriate clarification of the Act. In making this determination, the Committee restates its original view that it is not the intention of the Committee to shut down, or to significantly curtail, the activity of the tuna fleet so long as the Secretary is satisfied that tuna fishermen are using the best economically and technologically practicable marine mammal safety techniques. Although the amendment to section 101 (a) (2) retains the Act's goal of reducing the incidental taking of marine mammals to insignificant levels approaching a zero mortality and serious injury rate, the Committee believes a clarification is appropriate in light of the lengthy history of the regulation of incidental taking in the purse seine yellowfin tuna fishery and the substantial progress that has been made in developing new techniques and equipment for avoiding the incidental kill and serious injury of marine mammals. The Committee does not, however, intend that this amendment shall affect any authority the Secretary may have to promulgate regulations governing the incidental taking of marine mammals, including regulations prescribing annual quotas, which are found necessary to fulfill the obligations placed on the Secretary by the Act.

While recognizing the substantial progress that has been made in developing improve [sic] marine mammal safety techniques and equipment, the Committee is cognizant of the need to ensure that the best marine mammal safety techniques and equipment are used in the future. With this in mind, the Committee intends that its amendment be understood to require the use of new and improved marine mammal safety techniques and equipment once they have been developed, tested in the yellowfin tuna fishery, and determined, by the Secretary, to be economically and technologically practicable. The amendment to section 110, described below, will facilitate such development.

In considering this issue, the Committee decided to modify or elaborate upon the Act's goal with respect to other fisheries which incidentally take marine mammals. This does not mean that similar action could not be taken in the future when further data is available. The contrast between the substantial progress made by the tuna fleet in developing new techniques and equipment for reducing marine mam-

mal mortality and the failure of the foreign high seas salmon gillnet fishery, for example, to develop new techniques and equipment for reducing incidental mortality justifies limiting the amendment to the yellowfin tuna fishery. The existing goal in the Act can properly be used to stimulate new technology for reducing the incidental taking of marine mammals.

The language contained in the amendment to section 101(a)(2) regarding the rights of the Secretary of the Treasury to ban the importation of fish or fish products under certain circumstances merely incorporates the presently existing language in the Act. The Committee is aware that the United States presently requires those countries desirous of importing tuna products to comply with a specified certification program. It is the intent of the Committee that this certification program be continued.

Section 2 further amends section 101(a) of the Act by adding new paragraphs (4) and (5). New section 101(a) (4) provides that during any five-year period the Secretary shall allow the incidental, but not the intentional, taking by United States commercial fishermen of small numbers of marine mammals. Before allowing such a take, the Secretary, after notice and opportunity for public comment, must find that the total of such taking will have a negligible impact on the species and must provide guidelines pertaining to the establishment of a cooperative system among the fishermen involved for monitoring the take. A finding of negligible impact cannot be made if the species is depleted. The Secretary is directed to withdraw or suspend the permission take marine mammals under this provision if he finds, after notice and opportunity for public comment, that the taking is having more than a negligible impact on the species or that the purposes, policies and goals of the Act would be better served by applying the permit procedures otherwise provided for under the Act. Commercial fishermen authorized to take marine mammals pursuant to this new provision would not be required to seek permits pursuant to section 104 in accordance with regulations promulgated under section 103 of the Act.

New section 10 (a) (5) provides that the Secretary shall allow, upon request by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, the incidental, but not the intentional, taking of small numbers of marine mammals. This permission may be granted for periods of 5 years or less. Such taking may be allowed only if the species involved is not depleted and if the Secretary, after notice and opportunity for public comment, (1) finds that the total of such taking will have a negligible impact on the species and its habitat, and on the availability of the species for subsistence uses, (2) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance, and (3) prescribes regulations pertaining to the monitoring and reporting of such taking. The Secretary is directed to withdraw or suspend the permission to take marine mammals under this provision if he finds, after notice and opportunity for public comment, that (1) the regulations regarding methods of taking, monitoring, or reporting are not being substantially complied with, or (2) the taking is having, or may have, more than a negligible impact on the species. Permission to take under this provision may be suspended without notice or public comment if the Secretary determines that an emergency exists which poses a significant risk to the species concerned.

Sections 103 and 104 of the Act do not apply to the taking of marine mammals occurring under the authority of section 101 (a) (5).

Both sections 101 (a) (4) and (5) authorize the incidental, but not the intentional, taking of small numbers of marine mammals. The phrase "incidental, but not intentional" is intended to mean accidental taking. The words "not intentional" should not be read to mean that persons who know there is some possibility of taking marine mammals incidental to commercial fishing operations or other specified activities are precluded from proceeding under the authority of sections 101(a) (4) or (5).

The taking authorized under these new provisions is the taking of small numbers of marine mammals. The Committee recognizes the imprecision of the term "small numbers", but was unable to offer a more precise formulation because the concept is not capable of being expressed in absolute numerical limits. The Committee intends that these provisions be available for persons whose taking of marine mammals is infrequent, unavoidable, or accidental.

It should also be noted that these new provisions of the Act provide an additional and separate safeguard in that the Secretary must determine that the incidental takings of small numbers of marine mammals have a "negligible" impact upon the species from which such takings occur. This additional test is meant to serve as a separate standard restricting the authority of the Secretary. The term "negligible" is intended to mean an impact which is able to be disregarded. In this regard, the Committee notes that Webster's Dictionary defines the term "negligible" to mean "so small or unimportant or of so little consequence as to warrant little or no attention." Unless a particular activity takes only small numbers of marine mammals, and that taking has a negligible impact on the species, the new provisions of sections 101(a) (4) and (5) are not applicable to that activity.

It is the intention of the Committee that both the specified activity and the specified region referred to in section 101(a) (5) be narrowly identified so that the anticipated effects will be substantially similar. Thus, for example, it would not be appropriate for the Secretary to specify an activity as broad and diverse as outer continental shelf oil and gas development. Rather, the particular elements of that activity should be separately specified as, for example, seismic exploration or core drilling. Similarly, the specified geographical region should not be larger than is necessary to accomplish the specified activity, and should be drawn in such a way that the effects on marine mammals in the region are substantially the same. Thus, for example, it would be inappropriate to identify the entire Pacific coast of the North American Continent as a specified geographical region, but it may be appropriate to identify particular segments of that coast having similar characteristics, both biological and otherwise, as specified geographical regions.

Further, the Committee expects that persons operating under the authority of section 101 (a) (5) shall engage in appropriate research designed to reduce the incidental taking of marine mammals pursuant to the specified activity concerned.

Sections 101(a) (4) and (5) each provide a mechanism for the Secretary to withdraw or suspend the permission to take marine mammals granted under these provisions. Because such permission can be granted for five-year periods, it is not the Committee's intent that the Secretary must wait until the expiration of that period before determining whether to withdraw or suspend this permission to take. However, assuming the absence of more than a negligible impact, the Secretary must allow a sufficient time for the voluntary reporting system provided for in section 101(a) (4) to be established and put to use. The Committee notes with respect to commercial fishermen operating under section 101(a) (4) that the establishment of a voluntary reporting system is in response to the failure of the current Act to provide adequate data regarding the incidental taking of marine mammals which occurs in non-tuna commercial fishing operations. If this voluntary system fails to produce such data after a reasonable period of time, the Committee intends to fashion a more appropriate response which will reflect the experience that such a voluntary system cannot work.

In the case of a specified activity occurring under section 101(a) (5), there may be more than one person participating in that specified activity. The fact that one person of the class is not in compliance with the regulations issued pursuant to the section is not a sufficient basis for withdrawing or suspending permission for all persons to continue to operate under this section. There must be substantial compliance by either a person or by the class as a whole, in order for that person or for the entire class, respectively, to proceed under the authority of section 101 (a) (5).

Section 2 further amends section 101 by amending section 101(b) to clarify that the Native exemption established by section 101(b) does not apply to Indians, Aleuts or Eskimos who reside temporarily or permanently in states other than Alaska. It was not intended that section 101(b) be applicable to Natives in other states who might take marine mammals for subsistence purposes.

Section 2 further amends section 101(b) by providing that section 101(b) shall govern the taking of marine mammals by Alaskan Natives for subsistence uses except as provided in section 109. The purpose of this language is to explicitly overrule the decision of the United States District Court in *People of Togiak* v. *United States*, 470 F. Supp. 423 (DC 1979), which determined that section 101 (b) exempted Alaskan Natives from all state regulation. It is the Committee's intent to make it clear that Alaskan Natives are subject to state regulation pursuant to the provisions of section 109.

SECTION 3

Section 102 of the Act specifies the activities which are prohibited under the Act. Section 102(a) makes clear that these prohibitions apply except to the extent that they are permitted under other sections of the Act. Section 3(a) (1) of H.R. 4084 amends section 102(a) to include actions authorized under section 109 in the list of activities exempted from the coverage of section 102.

Section 3 (a) (1) further amends section 102 (a) by making it illegal for any person to possess a marine mammal, or any product from that mammal, and for any person to transport, purchase, sell, or offer to purchase or sell any marine mammal or marine mammal product. Section 102 as currently written makes the possession, transport, or sale, etc. of a marine mammal or its parts and products illegal only if the marine mammal was taken illegally. This has presented enforcement difficulties in the context of the taking for subsistence purposes where the taking itself is legal while the subsequent use of the marine mammal is in violation of the Act. H.R. 4084 makes it clear that the Secretary need not prove that the taking was illegal in order to proceed against individuals who are otherwise in violation of the Act. The Committee does not view this language as a new provision but rather as a clarification of what Congress always intended. In particular, the Committee reaffirms the fact that the disposition of the Native harvest is specifically provided for in section 101 (b) and any other use is illegal, regardless of the circumstances under which the animal was taken. This provision is not intended to effect the transportation of legally taken marine mammals from the high seas into the territorial sea.

The Committee takes note that both the Fish and Wildlife Service and the National Marine Fisheries Service, in their regulations implementing the Marine Mammal Protection Act, have included the collection of dead animals or their parts as a form of taking. In this regard, the definition of marine mammals includes the parts of marine mammals because the protection of these animals necessarily requires the control of commerce in the valuable products derived from them. The Committee, therefore, agrees that including the collection of dead animals or their parts in the definition of take is proper because it would be impossible under any circumstances to distinguish between parts derived from animals which have been killed and those which died from natural causes.

Section 105 (a) of the Act provides that any person who violates the Act may be assessed a civil penalty, except that no such penalty may be assessed unless the person is given notice, and an opportunity for a hearing, with respect to the violation. Any person who purchases a marine mammal product while overseas and who brings that product into the United States without a permit is in violation of the Act. It is not appropriate to subject individuals who unknowingly violate the Act by entering the United States with marine mammal products to a formal and lengthy notice of violation procedure. Therefore, section 3 (b) of H.R. 4084 amends section 105 (a) of the Act to authorize the Secretary, in lieu of instituting a formal notice of violation proceeding, to allow an individual to abandon the item at the port of entry if the importation was made for that individual's personal or family use and was not an importation for others or for sale or commercial use. This provision is intended to clarify that the Secretary has the authority to allow individuals to voluntarily abandon seized items at the port of entry without the necessity of further administrative proceedings. It is not intended to limit in any way the enforcement authority of the Secretary under this or any other Federal law.

SECTION 4

Section 4 makes several amendments to section 109 of the Act. Subsection (a) amends section 109 (a) to provide that no state may enforce, or attempt to enforce, any law or regulation relating to the taking of any marine mammal except as provided under section 109.

Subsection (a) also amends section 109 (b) to provide that the Secretary shall transfer management authority for any species of marine mammal to a state if the Secretary finds, after notice and opportunity for public comment, that the state has developed and will implement a program for the conservation and management of the species that:

(a) Is consistent with the purposes, policies, and goals of the Act and with international treaty obligations,

(b) Requires that that [sic] all taking of the species be humane,

(c) Does not permit the taking of the species unless—

(1) The state has determined, under a process consistent with the standards set forth in section 109 (c), that the species is at its optimum sustainable population and has specified the maximum number of animals that may be taken without reducing the species below its optimum sustainable population; and

(2) The determinations required in (1) above are final and implemented under state law and, if appropriate, a cooperative allocation agreement provided for in section 109(d) has been implemented;

(d) Does not permit the taking of a number of animals that exceeds the maximum number determined pursuant to (c) above and, in the case of subsistence uses, does not permit the taking of a number of animals that would be inconsistent with maintaining the species at its optimum sustainable population;

(e) Does not permit the taking of the species for scientific research and public display purposes, except for taking by, or for, the state;

(f) Provides procedures for acquiring and evaluating data relating to the optimum sustainable population of the species and to the maximum take which could be allowed and, if required, for amending those determinations;

(g) Provides procedures for the resolution of any differences between the state and the Secretary that may arise during the development of a cooperative allocation agreement under section 109 (d); and

(h) Provides for the submission of an annual report to the Secretary regarding the administration of the program.

Section 109 (b) sets forth the program requirements a state must comply with before management authority is returned. It is the Committee's intent that the state have the burden of persuasion when the Secretary reviews the state program to determine if it is consistent with the requirements of section 109 (b). In this regard, the Committee expects that the state program will be presented in a clear and coherent manner. Simply submitting a copy of the relevant state laws and regulations to the Secretary may not be sufficient to permit the Secretary to evaluate the state program.

Section 109 (b), as amended, authorizes the taking of marine mammals for subsistence uses provided that the taking is not inconsistent with the maintenance of the species at its optimum sustainable population. The purpose of this language is to permit the taking of marine mammals for subsistence uses even when the population is below its optimum sustainable population. The Committee recognizes the particular dependence of local rural residents in Alaska on marine mammals and does not wish to preclude the taking of marine mammals when a species is below its optimum sustainable population, provided that the level of taking will permit the species to increase toward its optimum sustainable population. A level of take which will not permit the species to increase toward its optimum sustainable population shall not be allowed. The Committee wishes to stress that the decline of a species to a level under its optimum sustainable population should be a rare occasion. The State, under the provisions of section 109 (f), should begin to restrict non-subsistence and even nonessential subsistence uses before a species becomes depleted.

Section 109 (b), as amended, also makes it clear that a state may not permit the taking of marine mammals for scientific research and public display purposes unless such taking is done by, or for, the state. Management of this take is retained at the Federal level except that, pursuant to section 109 (b) (3) (B) (ii), the Secretary may not permit the removal of live animals from a state to which management authority has been returned if that state disapproves the taking as inconsistent with its program. This state consistency determination must be made within 30 days of the date the permit is issued. The Committee expects that a state will be kept fully informed regarding permit applications and that the state will make its consistency finding, to the maximum extent practicable, prior to the permit being issued. To facilitate this objective the Secretary should make copies of permit applications available to the state as soon as they are received by the Secretary. Where this is not possible, the state should make its consistency finding promptly after the permit is issued. The Committee also expects the state to provide a mechanism whereby permittees can request the state to reconsider a finding that the permittee believes to be in error. The Committee notes that the state's review and approval authority only applies to permits approved after management authority is returned to the state. Permits approved prior to that time are not subject to state review even if the taking occurs after management authority is returned. Finally, the Committee wishes to make it clear that once state approval is given, it is valid for the duration of the permit.

The Committee wishes to emphasize that section 109 (b) (2), as amended, specifically provides that until the state determination of a species' optimum sustainable population and the maximum allowable take is final and implemented, the state program shall not apply with respect to the taking of that species and the Secretary shall continue to regulate all taking consistent with the Act.

However, pursuant to section 109 (b) (3), after these determinations are final and implemented under state law and after a cooperative allocation agreement, if required, is implemented, the state's optimum sustainable population and maximum take determinations shall be

treated, for purposes of applying this title beyond the territory of the state, as a section 103 Federal waiver of the moratorium on taking within the Fishery Conservation Zone. Where management authority has been returned to the state and where the required determinations and agreements have been made, the state will have exclusive authority to manage marine mammals within the state, including its territorial waters, except for scientific and public display takings described above. Section 109 (b) (3) (B) is intended to make this explicit.

Section 4 (a) further amends section 109 by adding a new subsection (c). New subsection (c) sets forth the process a state must complete before any determination of the optimum sustainable population and the maximum allowable take for a marine mammal species is final under section 109 (b). The process required must comply with the following standards:

(1) The state must make an initial determination of whether the species is at its optimum sustainable population and the maximum take which will be consistent with maintaining the species at its optimum sustainable population. In making these determinations the state must make available, under reasonable circumstances, the documentation supporting the determinations. This requirement is satisfied only if the public has reasonable access to the documentation. A state is neither required to duplicate, at its own expense, this documentation nor provide it to any member of the public who requests it. However, access to the documentation should be readily available, and if any interested party requests copies and agrees to pay the costs of duplication, the state should provide actual copies of the documents. If a request for a hearing regarding the initial determinations is not made, those determinations shall be treated as final. The Committee expects that the State will establish a reasonable time period, such as 30 days, in which a request for a hearing can be made.

(2) The state shall provide an opportunity, at the request of any interested party, for a hearing with respect to the initial determinations. At any such hearing, interested parties may present evidence regarding the determinations and may cross-examine persons presenting evidence. Prior to the hearing, the state must give public notice of the hearing and make available and distribute upon request a list of witnesses for the state and a general description of the documentation and other evidence that will be relied upon by such witnesses. It is essential that the state, prior to the hearing, make available and distribute these lists and descriptions, for without such advance notice, the right of cross-examination is significantly diluted. Persons serving notice that they wish to cross-examine witnesses at the hearing must be given sufficient time to familiarize themselves with the evidence which the state will present and to prepare appropriate questions. The fact that section 109 (c) (2) states that interested parties may present oral evidence and cross-examine at the hearing does not mean that only those persons presenting evidence are entitled to cross-examine. There is not a condition precedent to the right of cross-examination except that the state may require persons desiring to exercise that right to notify the state of their intent. Finally, the Committee notes that the state may not call witnesses and present documentation at the hearing unless the advance notice requirements are met.

(3) If a hearing is requested on the initial determinations, the state must make its final determinations solely on the basis of the record developed at the hearing. The word "solely" is intended to mean exclusively. A state may not rely on evidence, oral or written, which is not presented at the hearing. All written documentation, therefore, must be entered into the record by a person able, by virtue of training and experience, to respond fully to cross-examination regarding the facts and conclusions contained in the written material.

(4) Opportunity for judicial review of the state's final decision must be available under state law. However, the Secretary may not initiate judicial review of any such decisions.

Once the state program has been approved and the section 109 (c) process completed, the Secretary retains no residual authority to waive the moratorium and permit takings within state boundaries in addition to those which may be allowed by the state. With respect to the section 109 (c) process, it is not the Committee's intent that the state be required to comply with that process on an annual basis. It may be that the management of the species will require annual determinations of optimum sustainable populations and maximum permissible take. However, this may not necessarily be the case, even though state regulations setting different levels of take within the maximum number allowed and state regulations establishing seasons, areas, manner, etc. of take may change from year to year. Finally, the Committee wishes to make it clear that the procedure required under section 109 (c) is applicable only to the determination of the optimum sustainable population of a species and the maximum take of that species which may be allowed in order to maintain the optimum sustainable population. The section 109 (c) process is not applicable to other decisions made by the state respecting marine mammals. For example, a state's decision regarding the seasons, areas, manner of take, etc. is not subject to the section 109 (c) process.

Section 109 (d) (1), as amended by section 4 (a) of H.R. 4084, establishes a procedure for integrating Federal management of marine mammal species in the Fishery Conservation Zone with state management of such species in the territorial sea once management authority has been returned to the state. Section 109 (b) (3) states that if the range of a species with respect to which an optimum sustainable population determination is made under section 109 (b) (1) (C) extends beyond the territorial waters of the state, then the state's optimum sustainable population and maximum allowable take determination shall be treated within the Fishery Conservation Zone as a Secretarial determination made in accordance with section 103 and as an applicable waiver of the moratorium under section 101 (a). Section 109 (b) (3) further provides that in this situation, no taking of a marine mammal may be allowed until a cooperative allocation agreement is entered into between the state and the Secretary. The purpose of the agreement is to establish how many of the allowable number of marine mammals which the state determines can be taken will be taken in the Fishery Conservation Zone and how many will be

taken in lands and waters under state jurisdiction. The cooperative allocation agreement may cover two, and only two, types of taking: (1) subsistence uses, and (2) takings provided for under section 101 (a) which occur within the Fishery Conservation Zone. Taking within the territorial sea or on land within the state is solely within the discretion of the state after the two priorities established in the cooperative allocation agreement are satisfied.

The Committee notes that one purpose of the cooperative allocation agreement and the dispute resolution mechanism provided for in section 109 (b) (1) (G) is to ensure that the state does not assert the need for a number of mammals for subsistence uses which is not supported by historical experience or fact and which will preclude the occurrence within the Fishery Conservation Zone of commercial fishing and other specified activities involving the incidental taking of marine mammals. A second purpose is to ensure that the Secretary does not make unjustifiable claims regarding the number of marine mammals necessary for the Secretary to carry out his responsibilities pursuant to section 101 (a). It is not intended that the cooperative allocation agreement be a vehicle by which the Secretary can assert that the state has provided inadequate numbers of marine mammals for subsistence uses. That issue is to be resolved by the state and subsistence users pursuant to the state's subsistence laws and regulations.

Finally, it should be noted that the taking which is the subject of the cooperative allocation agreement is taking which results in the killing or serious injury of marine mammals. It is not necessary that the cooperative allocation agreement address other forms of taking within the meaning of that term.

Section 109 (d) (2) provides that if a state agency requests the Secretary to regulate the taking of a species subject to a cooperative allocation agreement within the Fishery Conservation Zone for subsistence uses or for hunting in a manner consistent with state regulations, the Secretary shall adopt and enforce such of the state's regulations as the Secretary considers to be consistent with his administration of section 101 (a). This section is intended to provide a mechanism for the Federal adoption of state regulations in areas beyond state territorial waters and is included in the language of H.R. 4084 in light of possible questions regarding the extra-territorial application of state law. However, the Secretary shall adopt the state regulations only to the extent that they are consistent with the Secretary's responsibilities under section 101 (a). For example, it is expected that State regulations relating to the caliber of a rifle which may be used to take a marine mammal would not affect the Secretary's responsibilities under section 101(a). On the other hand, a state regulation restricting the area or season for taking marine mammals could, if applied in the Fishery Conservation Zone, seriously impact the ability of the Secretary to permit commercial fishermen and other parties to take marine mammals within that zone. Such regulations would have to be carefully evaluated to determine if they should be adopted. Any regulation issued by the Secretary pursuant to this section shall be done under 5 U.S.C. 553 and any such regulations need not comply with the Regulatory Flexibility Act, the Paperwork Reduction Act, Executive Order No. 12291, and the thirty-day notice requirement of 5 U.S.C. 553(d).

Section 109 (e) establishes a procedure under which the Secretary can revoke any management authority returned to a state under section 109 (b). The Secretary is directed to revoke any such authority if he finds that the state program for the conservation and management of a species is not being implemented, or is being implemented in a manner inconsistent with the provisions of section 109 or the provisions of the program. The Secretary may not revoke any management transfer unless he first provides a written notice of his intent to revoke together with a statement indicating his reasons therefor and unless, during the ninety-day period following that notice of intent, the Secretary provides opportunity for consultation with the state and the state does not implement the necessary remedial measures. When a revocation by the Secretary becomes final, or if a state voluntarily returns management authority, the Secretary shall regulate the taking of a species within the state in accordance with this Act and, in the case of Alaskan Natives, pursuant to sections 101 (b) and 109 (i). In such a situation, the Federal moratorium as described in section 101(a) shall become effective until waived.

One of the bases for the Secretary to revoke state management authority is the failure of the state to comply with that part of its program requiring that the state have a procdure [sic] for evaluating new data and evidence relating to the optimum sustainable population of the species and the maximum take that would maintain the species at that level and, if required on the basis of that evaluation, for amending these determinations. A state may not be found in compliance with its program if it simply has procedures for acquiring data and evaluating that data. The state has an affirmative burden to alter its determinations pursuant to the process described in section 109 (c) if the new data and other evidence indicates a need to do so. Failure to do so constitutes a basis for revocation of management authority by the Secretary.

The Committee carefully considered the question of whether it was necessary to include in the bill a provision expressly authorizing judicial review of action by the Secretary under section 109 (b) approving or disapproving a proposed state management program or revoking or refusing to revoke such approval pursuant to section 109 (e). The Committee concluded that it was unnecessary to do so, although the Committee does not intend to preclude judicial review at the request of interested parties. If the Secretary's action or inaction is unlawful under the applicable standards of review prescribed by the Administrative Procedures Act, then the affected state or other interested party will be able to seek appropriate relief. Jurisdiction and venue over any such action would be governed by statutes of general applicability codified in Title 28 of the United States Code.

Section 4 (a) further amends section 109 by adding a new subsection (f) which provides that the Secretary may not tarnsfer [sic] management authority to the state of Alaska for any species of marine mammal unless the state has adopted and will implement a statute and regulations that ensure the taking of such species for subsistence uses is accomplished in a non-wasteful manner, will be the priority consumptive use of the species, and if subsistence taking must be restricted, that such restriction will be based on: (1) the customary and direct

dependence upon the species as the mainstay of livelihood, (2) local residency and (3) the availability of alternative resources. In addition, the Secretary must find that the state has adopted a statute or regulation requiring that any consumptive use of marine mammal species, other than for subsistence uses, will be authorized only if the appropriate state agency first makes findings based on an administrative record (which need not be the type of proceeding carried out before an administrative law judge), that such use will have no significant adverse impact upon subsistence uses of the species and the regulations of such use will, to the maximum extent practicable, provide economic opportunities for the residents of rural coastal villages of Alaska who engage in subsistence uses of that species.

Section 109 (f) (2) defines the term "subsistence uses" as the customary and traditional uses by rural Alaska residents of marine mammals for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles out of non-edible by-products taken for personal or family consumption; and for barter, or sharing for personal or family consumption.

The Committee believes that the issue of subsistence taking must be addressed in Alaska's management program, given the importance of that take to persons dependent upon subsistence taking and given the history of court cases surrounding the authority of the state to regulate subsistence taking by Alaskan Natives. If management of a marine mammal species is returned to the State of Alaska, Native takings should be blended into the overall state regulatory regime. It should be emphasized that H.R. 4084 submits Native taking to state regulation only as part of a state management program which has been approved by the Secretary and only for so long as that program is in effect. Prior to implementation of the Alaska State program or subsequent to revocation of state management authority by the Secretary, Native taking of a species shall be subject to the provisions of sections 101 (b) and 109 (i).

The Committee is cognizant of the similarity of section 109 (f) to certain provisions in Title 8 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96–487. Section 109 (f) (1) (A), for example, is intended to establish a subsistence priority similar, but not identical, to the subsistence priority established in section 804 of ANILCA. The Committee wishes to emphasize that this subsistence priority is intended to operate in the same manner as the subsistence priority set forth in section 804 of ANILCA. The priority requires that all subsistence uses of a species be satisfied before the state may authorize any non-subsistence taking. It should be noted, however, that the Marine Mammal Protection Act subsistence priority differs from the ANILCA priority in that customary trade is not included within the purview of section 109. The section 109 (f) (2) definition of subsistence uses is identical to the definition of the same term in section 803 of ANILCA in that it defines subsistence uses as the customary and traditional uses by rural Alaska residents for the personal and family consumption purposes set forth in section 803. The removal of customary trade from the subsistence use definition is not intended to

diminish the Committee's recognition of the importance of customary trade of marine mammals in many rural Alaska villages.

With respect to the non-subsistence harvest of marine mammals, section 109 (f) (1) (B) (i) requires the State of Alaska to determine that all subsistence uses will be satisfied and that a non-subsistence harvest will not adversely affect the subsistence harvest to a significant degree before the State may adopt any regulations authorizing a non-subsistence harvest. Section 109 (f) (1) (B) (ii) requires that the regulation of non-subsistence uses provide, to the maximum extent practicable, economic opportunities for the residents of the rural coastal villages of Alaska who engage in subsistence uses because the economies of certain villages are substantially dependent upon the harvest of marine mammals. If, for example, the State determines that all subsistence uses of walrus in a particular area can be satisfied and still allow a non-subsistence harvest, the State must determine whether the residents of the local villages desire and are capable of harvesting all of the non-subsistence surplus. If so, section 109 (f) (1) (B) (ii) requires that State regulations structure the non-subsistence harvest so as to provide economic opportunities for the residents of rural coastal villages who engage in subsistence uses of that species. The economic opportunities referred to include not only the opportunity to take the animals, but also the opportunity to serve as marine mammal hunting guides. The State may not authorize a guided hunt for any marine mammal species until the state has done everything practicable to license the residents of coastal villages of the affected area. If competent and knowledgable [sic] local residents are available, they must be licensed.

Section 109 (g), as amended by section 4 (a), provides that the National Environmental Policy Act shall not be applicable to the transfer of management authority to a state or to the revocation or voluntary return of such authority from the state to the Federal Government. The Committee wishes to emphasize that section 109 (g) also applies to the process provided for in section 109 (c).

Section 109 (h) essentially restates existing law, except that, as rewritten, subsection (h) clarifies that Federal, as well as state or local employees, may take marine mammals in the course of their official duties and clarifies that the non-lethal removal of nuisance animals may also be carried out by Federal, state or local government employees. For example, the appropriate governmental employees may remove harbor seals trapped in fish ladders.

Section 109 (i) authorizes the Secretary, after providing notice and opportunity for a hearing in the affected area, to prescribe regulations requiring the marking, tagging, and reporting of marine mammals taken by Alaskan natives pursuant to section 101 (b). This provision is designed to enable the Secretary to gather sufficient data on the taking of marine mammals by Alaskan Natives to determine what effect such taking is having on marine mammal populations. The marking and tagging of animals will also provide the Secretary with a means of monitoring the disposition of the Native harvest to ensure that any commercial use of marine mammal products meets the criteria set forth in section 101(b) (2). In addition to the normal

rulemaking requirements of the Administrative Procedures Act, section 109 (i) requires rulemaking to be preceded by public notice (which is reasonably calculated to reach the residents of Alaska's rural villages in a timely manner) and by an opportunity for a public hearing in the affected area. These additional procedural requirements recognize the unique logistical and communications problems in rural Alaska, and the importance of providing local village people—many of whom are unfamiliar with normal written rulemaking procedures—with an opportunity to express their views orally on proposed rulemaking within their own communities. It is not intended that the requirement to provide notification through "appropriate electronic media" mandate the use of expensive television and radio commercials.

Section 109 (j) rewrites existing law to authorize the Secretary to make grants to assist states in developing, as well as in implementing, state management programs. Current law restricts eligibility for these grants to implementing an approved state program. It was the Committee's view that it would be in the best interest of the Act to permit states to receive funds for the development of management programs. Grants made under this subsection may not exceed 50 percent of the costs of developing or implementing state programs.

Section 4 (b) of H.R. 4084 provides that nothing in the amendments made by section 4 (a) shall be construed as affecting in any manner any cooperative agreement entered into by a state under section 6 (c) of the Endangered Species Act of 1973. Of particular concern to the Committee was the possibility that H.R. 4084 would be interpreted as invalidating section 6 (c) cooperative agreements entered into for the conservation and management of the endangered manatee in the State of Florida. Section 4 (b) will preclude this result. The Committee also notes that section 17 of the Endangered Species Act provides that, in the case of conflicts between the Endangered Species Act and the Marine Mammals Protection Act, the more restrictive provision applies. Nothing in H.R. 4084 is intended to alter that result.

SECTION 5

Section 5 of H.R. 4084 amends section 110 (a) of the Act to direct the Secretary to undertake a program of, and provide financial assistance for, research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals. At present, section 110 (a) authorizes the Secretary to make grants to other agencies or persons for marine mammal research. As amended, section 110 (a) would direct the Secretary to continue that function as well as to undertake a program of research on his own. The marine mammal research required by this section specifically includes research into new methods of locating and catching yellowfin tuna by purse seine vessels without the incidental take of marine mammals. Research involving aggregating devices is now being undertaken and the purpose of this amendment, among other things, is to encourage the continuation of that research. The tuna industry is presently engaged in such research, and the amendment to section 110 (a) would expressly make it possible

for the government to participate in, or support, that research as well as other projects to discover better technology to avoid conflicts between marine mammals and the fishing industry.

SECTION 6

Section 6 of H.R. 4084 makes technical amendments to Title II of the Act which establishes, and specifies the functions of, the Marine Mammal Commission. Specifically, section 6 repeals the requirement that the Commission submit a copy of any report or recommendation to the Secretary before publication and clarifies that the Commission, in carrying on its responsibilities under the Act may make grants to persons.

SECTION 7

Section 7 of H.R. 4084 amends the Act to authorize $8,000,000 for fiscal year 1983 and $8,800,000 for fiscal year 1984 for the Department of Commerce. Section 7 further amends the Act to authorize, for the Department of the Interior, $1,760,000 for fiscal year 1983 and $2,000,000 for fiscal year 1984. Finally, section 7 authorizes the appropriation of $1,000,000 in fiscal year 1983 and $1,100,000 in fiscal year 1984 for the Marine Mammal Commission to carry out its responsibilities under the Act.

The Committee decided to eliminate the division of authorizations of appropriations for research and authorizations for other purposes. For bureaucratic reasons peculiar to their own institutions, the Departments of Commerce and the Interior interpreted these provisions differently. The Committee intends that the agencies continue to carry on active research programs at approximately the same level as their current programs. The Committee also notes that return of management of a species of marine mammals to a state should not preclude Federal research on that species. Almost all marine mammals spend some portions of their life cycle in Federal waters. Their role in the marine ecosystem and their aesthetic and economic values are factors which make them appropriate subjects for research on the Federal level. The Committee also notes that, because the Federal Government may be called upon to resume management at any time, Federal research, in cooperation with state agencies, should continue.

COST OF THE LEGISLATION

In the event that this legislation is enacted into law, the Committee estimates the cost to the Federal Government to be not in excess of $10,760,000 in fiscal year 1983 and $11,900,000 in fiscal year 1984.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2 (1) (4) of Rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 4084 would have no significant inflationary impact on the prices and cost in the national economy.

98TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 98–758

MARINE MAMMAL PROTECTION ACT AUTHORIZATION FOR FISCAL YEARS 1985–1988

MAY 15, 1984.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. JONES of North Carolina, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H.R. 4997]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries to whom was referred the bill (H.R. 4997) to authorize appropriations to carry out the Marine Mammal Protection Act of 1972 for fiscal years 1985, 1986, and 1987, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert the following:

That the last sentence of section 101(a)(2) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)(2)) is amended to read as follows: "For purposes of applying the preceding sentence, the Secretary—

"(A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States; and

"(B) in the case of yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, shall require that the government of the exporting nation provide documentary evidence that—

"(i) the government of the harvesting nation has adopted a regulatory program governing the incidental taking of marine mammals in the course of such harvesting that is comparable to that of the United States; and

"(ii) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of

Legislative History

H.R. 4997, a simple three-year reauthorization of the Marine Mammal Protection Act (MMPA) at existing levels, was introduced on March 1, 1984, by Mr. Breaux and Mr. Forsythe, and was referred to the Committee on Merchant Marine and Fisheries.

A hearing was held by the Subcommittee on Fisheries and Wildlife Conservation and the Environment on March 15, 1984, at which testimony was received from representatives of the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service, the Marine Mammal Commission (MMC), various conservation groups, the tuna fishing industry, Sea World, Inc., and the Western Oil and Gas Association. Without exception, these witnesses supported reauthorization of the MMPA.

Issues other than reauthorization which were discussed during the course of this hearing included: a recent court decision relating to the use of observers on tuna vessels for the enforcement of MMPA regulations; the calculation of optimum sustainable population (OSP) and whether it should be permissible to allow some take of marine mammals whose populations are below OSP but increasing in size; entanglement of marine mammals in net fragments, packing bands, and other debris lost or discarded at sea; and options, including translocation, for the recovery of the California Sea Otter, a threatened species under the Endangered Species Act of 1973.

Testimony was also received from Congressmen Rod Chandler and Norm Dicks of the State of Washington and representatives of NMFS Office of Protected Species and Habitat Conservation, MMC Committee of Scientific Advisors, Greenpeace U.S.A., The Whale Center, and Sea World, Inc., regarding H.R. 4457, a bill to prohibit the taking and importation of killer whales for public display purposes, which would invalidate a permit for this purpose previously issued to Sea World, Inc.

After consideration of the aforementioned testimony, the Subcommittee marked up H.R. 4997 on May 9, 1984. Amendments in the nature of a substitute and to revise the title of the bill were adopted and the bill was favorably reported to the full Committee, both by unanimous voice vote.

On May 10, 1984, the full Committee marked up H.R. 4997, as amended, and ordered it favorably reported to the House by a unanimous voice vote.

THE AMENDMENTS

The amendments:

(a) extend the authorization of appropriations from three to four years, through Fiscal Year 1988;

(b) increase the Interior Department authorization by $.5 million for Fiscal Year 1985 and $1 million for each of the next three years;

(c) tighten the import requirements for fish and fish products harvested by foreign tuna vessels in the eastern tropical Pacific Ocean;

(d) freeze the existing general permit of the American Tunaboat Association for the incidental taking of porpoise in connection with the commercial purse seine tuna fishery in that ocean;

(e) set a limit of 250 coastal spotted dolphin and 2,750 eastern spinner dolphin that may be taken incidental to that fishery and prohibit any accidental take of these species;

(f) direct the Secretary of Commerce to carry out a scientific research program to monitor, for at least five years, population abundance and trends for related marine mammal stocks and authorize a $4 million appropriation to carry out such research;

(g) direct the Secretary of Commerce to make appropriate modifications to the incidental take quotas or other requirements of the general permit, if it is determined that the existing incidental take is having a significant adverse effect on a marine mammal population stock; and

(h) revise the title of the bill to reflect the foregoing changes.

BACKGROUND AND NEED FOR LEGISLATION

The Marine Mammal Protection Act (MMPA) was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at healthy population levels. In passing the Act, Congress responded to the growing concern about the decline of certain species and recognized the important role that marine mammals play in the ecosystem as well as their economic, aesthetic and recreational value.

Under the MMPA, the Department of Commerce is charged with responsibility for whales, dolphins (porpoises), sea lions and seals. The Department of the Interior has responsibility for polar bears, walruses, sea otters, manatees and dugongs. The Act establishes a moratorium on the taking of marine mammals unless the population of an animal is determined to be at its optimum sustainable level. State management of resident marine mammal populations is preempted until such time as a state prepares a marine mammal management program consistent with the Act. Criminal and civil penalties are prescribed for violations of the Act and the importation of marine mammals and their products is subject to regulation. The Act created a three-member Marine Mammal Commission which is charged with monitoring the implementation of the Act, recommending policies to the two Secretaries, and undertaking such research as is deemed appropriate.

Perhaps the most visible success of the Marine Mammal Protection Act has been the dramatic reduction in U.S. take of porpoises incidental to the purse seine fishing operations for yellowfin tuna in

the eastern tropical Pacific Ocean. The number of porpoises killed or seriously injured has dropped from an estimated 368,600 in 1972 to an estimated 8,258 in 1983. On December 1, 1980, the National Marine Fisheries Service (NMFS) within the Department of Commerce issued a general permit for a total annual incidental take of porpoise in the U.S. yellowfin tuna fishery of up to 20,500 animals of all species combined. This level of take is not viewed by scientists for NMFS, the tuna industry, or major environmental groups as likely to significantly adversely affect the porpoise stocks in question. This general permit is due to expire in 1985.

During a hearing held on the MMPA by the Subcommittee on Fisheries and Wildlife Conservation and the Environment on March 15, 1984, it became clear that the current process for issuing permits for incidental take of porpoises in the tuna fishery remains as lengthy and complex as when the level of take was many times greater. Further, there are continuing disputes about the validity of data and assumptions used in calculations of present and historic stock size necessary under current permitting procedures. These dispute [sic] precipitated extensive legal and administrative proceedings over the issuance of the current general permit for incidental take, and it appears likely that similar disputes would again arise in the issuance of future permits.

Under the terms of the MMPA, the incidental take of animals from various porpoise stocks is allowed only if the given stock is determined to be at the Optimum Sustainable Population (OSP) level. The MMPA defines OSP as the number of animals which results in the maximum productivity of the stock, keeping in mind the carrying capacity of the environment and the health of the ecosystem of which it is a constituent part.

For regulatory purposes, NMFS has determined that OSP is a range of population levels between maximum net productivity and carrying capacity. For porpoise stocks taken incidentally in the purse seine fishery, NMFS considers carrying capacity to be synonymous with historic marine mammal stock levels prior to extensive development of the tuna purse seine fishery (i.e. 1959). Using the historic stock level estimate of carrying capacity as an upper bound, NMFS defines the lower limit of the OSP range as 60 percent of this historic population level. This percentage designation of the maximum net productivity level is based on theoretical considerations of porpoise population dynamics. In effect, this interpretation of OSP requires estimation of historic stock size in order to numerically define the lower limit of OSP and determine if the current stock size is sufficient to allow for an incidental take under terms of the MMPA.

The Committee recognizes that if NMFS could estimate both current and historic stock sizes with a high degree or [sic] precision, the current controversy over the status of various porpoise stocks might well not exist. However, this is unfortunately not possible given the paucity of mortality data for the period 1959–1972, variable estimates of net recruitment, and the technical problems inherent in estimation of stock levels over so large an expanse of ocean. In essence, it has become apparent that the available data base is inadequate to support the calculations necessary for this method to be an effective management tool.

Members of the environmental community, the tuna industry, and the Federal government all recognize that an alternative approach for issuance of a general permit for incidental take of porpoise in the purse seine fishery for tuna is desirable. Such an alternative should be designed to provide strong protection for affected porpoise stocks while reducing the need for extensive administrative and legal proceedings. In addition, any alternative approach should be consistent with the MMPA goal to reduce the incidental take of porpoise in the tuna fishery to the lowest level which is economically and technologically practicable.

During the March 15, 1984, Subcommittee hearing, and in discussion with concerned domestic interests, concerns were also expressed about the degree to which foreign nations engaged in the tuna purse seine fishery in the eastern tropical Pacific Ocean are taking appropriate steps to minimize the incidental taking of porpoises. The MMPA provides that the Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or serious injury of ocean mammals in substantial excess of United States standards. In carrying out this mandate, the Secretary is required to insist on reasonable proof from the government of an exporting nation of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products. The Subcommittee determined that it was necessary to strengthen the requirements of the Act with respect to documentation of compliance by foreign nations with the essential features of the MMPA.

In addition to the aforementioned problems relating to incidental take of porpoise in the tuna fishery, testimony at the Subcommittee hearing revealed potential problems with recovery of the threatened California sea otter and with inadequate Federal management of marine mammals in Alaska.

The Marine Mammal Protection Act, in conjunction with the Endangered Species Act, has been an important contributor to the health of a number of marine mammal populations, including that of the threatened California sea otter. The future of the sea otter remains uncertain, however, primarily due to perceived threats resulting from incidental mortality in coastal fisheries, conflicts with shellfish industries, and potential impacts of Outer Continental Shelf oil and gas exploration and tanker traffic. The status of the California sea otter and the nature of these potential threats were addressed by as [sic] number of witnesses at the Subcommittee hearing. To counter these threats, particularly in regard to oil and gas activities, the U.S. Fish and Wildlife Service has proposed the translocation of a group of sea otters to a location outside the current sea otter range. These animals would form a nucleus for development of an independent population which would be spatially separated from any potentially catastrophic event affecting the primary sea otter population. One of the Channel Islands, San Nichols, has figured prominently as a potential translocation site.

The translocation proposal has generated serious controversy among the Federal and state governments, the oil and shellfish industries, and sea otter protection groups. However, these parties have recently agreed to participate in development of an Environmental Impact Statement (EIS) to examine alternatives for sea otter conservation. Should amendments to either the MMPA or the Endangered Species Act (ESA) prove necessary to more effectively implement sea otter recovery plans after completion of the EIS process, such amendments may be developed by the Committee when it addresses reauthorization of the ESA in 1985.

A clear intent of Congress in development of the MMPA was that states should assume management responsibility for resident marine mammals within their jurisdiction through development of management programs consistent with the purposes of the MMPA. No state currently has management authority over any marine mammal species, despite amendment of the MMPA in 1981 to facilitate such return of management authority.

At the Subcommittee hearing, it was learned that the Department of the Interior had failed to develop regulations regarding the marking and tagging of Alaskan marine mammals and their parts and products. These regulations are necessary to gain essential information on the level of native subsistence take and to control illegal traffic in marine mammal parts and products. The Department of the Interior has been hesitant to implement regulations due to anticipation that the State of Alaska would, at any time, apply to resume management authority. The State has not yet applied for such a resumption of management, and does not appear likely to do so within the immediate future. Therefore, the Department of the Interior has informed the Committee that it intends to begin development and implementation of such regulations for walrus, polar bear and sea otter in Alaska under its management authority. The Committee, noting the potential for adverse impacts on these marine mammal stocks due to the failure to promulgate such regulations, suggests that these regulations be developed and implemented as expeditiously as possible.

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 of H.R. 4997 amends section 101(a)(2) of the Marine Mammal Protection Act (MMPA) to ensure that nations exporting yellowfin tuna harvested with purse seines in the eastern tropical Pacific Ocean have in place a regulatory program for marine mammal protection measures which is comparable to that of the United States. Current law directs the Secretary of the Treasury to ban the importation of fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or serious injury of ocean mammals in excess of U.S. standards. The MMPA directs the Administration to insist on reasonable proof from the government of the exporting nation relative to the effects on marine mammals of the commercial fishing technology utilized by that nation.

The amendment requires that, in making the determination with respect to yellowfin tuna caught in the eastern tropical Pacific, the Administration shall require documentary evidence from the government of the exporting nation that the government of the harvesting nation has adopted a regulatory program governing the in-

cidental taking of marine mammals in its fishery that is comparable to that of the United States. It further requires documentation that the average rate of incidental taking of marine mammals by the harvesting nation in the fishery is comparable to that of the United States.

The Committee notes that the regulatory program of the U.S. relating to the incidental take of marine mammals in the yellowfin tuna fishery is quite extensive and detailed. The Committee does not intend to require that the regulatory program of foreign countries should be identical to that of the United States. Programs which require the basic equipment and techniques used to protect porpoises and have as their purpose the minimization of the number of animals incidentally taken would be comparable as long as they provided a level of protection that is substantially equivalent to that of the U.S. program. Similarly, the average rate of incidental taking will vary from year to year. The Committee does not intend that the import of tuna products should be banned if the rate of incidental taking is slightly higher in any given year. However, the report of levels of incidental take being consistently higher than that of the U.S. or significantly higher in a given year should result in the prohibition of imports. The Committee expects that the Administration will require reliable estimates of incidental take that are consistent with observer data provided to the Inter-American Tropical Tuna Commission (IATTC). The Committee further intends that NMFS should, as part of its regulatory program, encourage foreign nations which have not done so to implement an observer program, either on their own or in cooperation with the IATTC.

SECTION 2

In general, Section 2 of H.R. 4997 extends the current permit for the incidental taking of marine mammals in the purse seine fishery for yellowfin tuna and institutes a special five year study to gather additional and more accurate data relative to porpoise abundance and population trends in the area where the fishery occurs.

Specifically, section 2 amends subsection (h) of Section 104 of the MMPA which authorizes the issuance of general permits for the taking of marine mammals. The current law relating to general permits would become paragraph (1) and new paragraphs would be added. New paragraph 2(A) would extend the permit in force, which was granted to the American Tunaboat, Association on December 1, 1980, for an indefinite period subject to a number of specific conditions.

The first condition is that the permit would cease to have force and effect if it were terminated or surrendered. The second permit condition incorporates the standard in Section 101(a)(2) of the MMPA which states that the goal of the Act is to reduce the incidental kill and incidental serious injury of marine mammals to insignificant levels approaching zero, but provides that the goal is satisfied in the case of purse seine fishing for yellowfin tuna by the continuation of the application of the best marine mammal safety techniques that are economically and technologically practicable.

The third condition states that the terms and conditions of the general permit shall remain in force for the duration of the permit with several exceptions. The first exception allows the Secretary to make adjustments in the requirements relating to fishing gear, fishing practices and permit administration as may be appropriate. The intent of this paragraph is to allow the Secretary to alter the permit requirements in ways that are consistent with the goals of the Act. The Committee is aware that the Secretary is considering changing a number of regulations and permit requirements to guidelines and believe such a change would fall within the scope of this exception. Similarly, if new porpoise saving equipment or techniques that are economically and technologically paracticable [sic] are discovered, the permit conditions could be altered to require their use. The Committee does not intend that this exception be read to authorize major changes in the program or changes that would not further the goals of the Act.

The second exception allows the terms and conditions to be amended or terminated if the decision to do so is based on the best scientific information available, including that obtained from the monitoring program established under the legislation. The third exception provides a limited quota for incidental take of two species for which no quota is provided under the current permit. It allows an incidental take of up to 250 coastal spotted dolphin and up to 2750 easterm [sic] spinner dolphin. These quotas are to be included within the overall annual quota of 20,500 dolphins in the general permit. In addition, during that period when an incidental take quota is in effect, the accidental take policy relating to these two species would not apply.

While other amendments to the Marine Mammal Protection Act were considered, it was the opinion of the Committee that further amendments not be addressed at this time. The Committee is cognizant of the fact that a specific request was made that an amendment be considered to clarify Congressional intent with regard to the placement of Federal observers on board U.S. purse seine vessels. The Committee decided against such an amendment pending a ruling by the U.S. Supreme Court in the matter of BALELO vs. BALDRIGE.

Section 2 further directs the Secretary of Commerce to conduct ongoing studies to assess trends in porpoise stock levels for stocks affected by incidental take in the purse seine fishery for yellowfin tuna in the eastern tropical Pacific Ocean, and to develop indices of abundance for these stocks. It is the intent of the Committee that the results of these trend analyses and changes in stock abundance indices be used as a primary, though not exclusive, source of information for monitoring and assessment of the health and status of affected porpoise stocks. The Secretary is directed to consider the results of this monitoring program and other scientific information in determination of the effects of incidental take on marine mammal stocks. The Committee encourages the Secretary to develop the theoretical bases to allow the use of these data to the fullest extent practicable in the assessment of trends in porpoise stock abundance.

The Committee notes the failure of existing methods to produce determinations of current and historic stock status of sufficient

precision to be of merit in rational regulation of incidental take of marine mammals. The Committee intends that the study provide a basis for a rational method for determining if marine mammal stocks are being adversely affected by incidental take. Reports to Congress during the period of the study should include discussions of alternative methods for making the necessary determinations relating to incidental take. In addition, during the period of the permit, assessments of affected porpoise stocks, for purposes of determining whether or not the permit should be modified, should not rely on methods that require calculations which are dependent on extensive extrapolation from a limited data base.

Should the Secretary determine from the best available scientific information that the level of incidental take of porpoises authorized under the general permit is having a significant adverse effect on the stock in question, the legislation mandates modification of the take quota and/or requirements concerning fishing gear or practices to the extent necessary to protect the stock so affected. The Department of Commerce is authorized to be appropriated up to a total of $4 million over the four-year period of fiscal year 1985 through fiscal year 1988 to develop and conduct the necessary monitoring program required by this section.

SECTION 3

Section 3 of the amendment authorizes appropriations for the purposes of the MMPA of $2.5 million for fiscal year 1985 and $3.0 million annually for fiscal year 1986 through fiscal year 1988 for the Department of the Interior. The Department of Commerce is authorized to be appropriated $8.8 million for each of fiscal years 1985 through 1988. These sums are in addition to the authorization provided in Section 2 for monitoring studies on porpoise stocks in the eastern tropical Pacific Ocean. The Marine Mammal Commission is authorized appropriations of $1.1 million annually for each of fiscal years 1985 through 1988.

COST OF THE LEGISLATION

In the event that this legislation is enacted into law, the Committee estimates the cost to the Federal government to be not in excess of $13.4 million in fiscal year 1985 and $13.9 million in fiscal years 1986, 1987, 1988.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 4997 would have no significant inflationary impact on the prices and costs in the national economy.

COMPLIANCE WITH CLAUSE 2(1)(3) OF RULE XI

With respect to the requirements of clause 2(1)(3) of Rule XI of the Rules of the House of Representatives:

(A) A day of hearings was held on the legislation on March 15, 1984, by the Subcommittee on Fisheries and Wildlife Conservation and the Environment.

(B) The requirements of Section 308(a) of the Congressional Budget Act of 1974 are not applicable to this legislation.

(C) The Committee on Government Operations has sent no report to the Committee on Merchant Marine and Fisheries pursuant to clause 2(b)(2) of Rule X.

(D) A letter was received from the Director of the Congressional Budget Office, pursuant to Section 403 of the Congressional Budget Act of 1974 in reference to H.R. 4997 and follows herewith:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., May 11, 1984.

Hon. WALTER B. JONES,
Chairman, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for H.R. 4997, a bill to authorize appropriations to carry out the Marine Mammal Protection Act of 1972 for fiscal years 1985 through 1988, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ERIC HANUSHER
(for Rudolph G. Penner).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 4997.
2. Bill title: A bill to authorize appropriations to carry out the Marine Mammal Protection Act of 1972 for fiscal years 1985 through 1988, and for other purposes.
3. Bill status: As ordered reported by the House Committee on Merchant Marine and Fisheries, May 10, 1984.
4. Bill purpose: H.R. 4997 authorizes appropriations for marine mammal conservation and management activities of the Marine Mammal Commission and the Departments of Commerce and the Interior for fiscal years 1985 through 1988. In addition, the bill would require the Secretary of Commerce to monitor marine mammal populations and would authorize the appropriation of $4 million over the period ending September 30, 1988 for that purpose.
5. Estimated cost to the Federal Government:

[By fiscal years; in millions of dollars]

	1985	1986	1987	1988	1989
Authorization level	13.4	13.9	13.9	13.9	—
Estimated outlays	9.8	13.0	13.6	13.8	5.2

The costs of this bill fall within budget function 300.

Basis of Estimate.—Authorization levels are as stated in the bill. For purposes of this estimate, it is assumed that the full amounts authorized will be appropriated prior to the beginning of each fiscal year. It is further assumed that the $4 million authorized for

the monitoring of marine mammal populations will be appropriated at a rate of $1 million per year. Outlays are estimated on the basis of historical spending patterns for these and similar activities.

6. Estimated cost to State and local governments: None.
7. Estimate comparison: None.
8. Previous CBO estimated: None.
9. Estimate prepared by, Deb Reis.
10. Estimate approved by C. G. Nuckols for James L. Blum, Assistant Director for Budget Analysis.

Departmental Reports

The bill, H.R. 4997, was referred to several different Departments, but no Departmental reports were received. However, the Committee received an Executive Communication from the Department of Commerce, the Department of the Interior and the Marine Mammal Commission, which follows herewith:

THE SECRETARY OF COMMERCE,
Washington, D. C., April 11, 1984.

[Ex. Comm. 3198]

Hon. THOMAS P. O'NEILL, Jr.,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Enclosed are six copies of a draft bill—"To extend the authorization of appropriations for the Marine Mammal Protection Act of 1972 through fiscal year 1987," together with its statement of purpose and need and section-by-section analysis.

We have been advised by the Office Of Management and Budget that there is no objection to the submission of this legislation to the Congress, and that enactment of this legislation would be in accord with the program of the President.

Sincerely,

MALCOLM BALDRIGE,
Secretary of Commerce,
WILLIAM CLARK,
Secretary of the Interior,
JOHN R. TWISS, Jr.,
Executive Director, Marine Mammal Commission.

Enclosures.

A Bill To extend the authorization of appropriations for the Marine Mammal Protection Act of 1972 through fiscal year 1987.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 7(a) of the Act of October 9, 1981 (Pub. L. No. 97–58; 16 U.S.C. § 1384(a)) is amended—

(a) by striking out "and" after "1983," where it appears; and

(b) by striking out "1984." where it appears and inserting in lieu thereof "1984, $6,092,000 for fiscal year 1985, and such sums as may be necessary for fiscal year 1986 and 1987.".

Sec. 2. Section 7(b) is amended—

(a) by striking out "and" after "1983," where it appears; and

(b) by striking out "1984." where it appears and inserting in lieu thereof "1984, $2,230,000 for fiscal year 1985, and such sums as may be necessary for fiscal years 1986 and 1987.".

Sec. 3. Section 7(c) is amended—

(a) by striking out "and" after "1983," where it appears; and

(b) by striking out "1984." where it appears and inserting in lieu thereof "1984, $648,000 for fiscal year 1985, and such sums as may be necessary for fiscal years 1986 and 1987.".

Statement of Purpose and Need

The Marine Mammal Protection Act of 1972 (Pub. L. No. 92-522, as amended; 16 U.S.C. §§ 1361-1407) (the "Act") was enacted to establish a Federal responsibility for the conservation of marine mammal populations. The Act establishes a moratorium on the taking and importation of designated marine mammals and marine mammal products, contains procedures for waiving this moratorium and transferring management to the States, establishes a permitting system, and provides for enforcement by the Departments of Commerce and the Interior. In addition, the Act provides for Federal cooperation with States, marine mammal research grants, and a program to develop fisheries gear and methods to reduce to the maximum extent practicable incidental takings of marine mammals. The Act also provides for the support of the Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals.

Under the Act, the Department of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA), is responsible for whales, porpoises, seals and sea lions. NOAA has been instrumental in reducing incidental taking of porpoise in the course of commercial tuna fishing operations from in excess of 400,000 per year to slightly in excess of 20,000 per year. This reduction has been achieved to a great extent through research conducted by NOAA scientists pursuant to the Act.

Under the Act, the Secretary of the Interior, through the U.S. Fish and Wildlife Service, is responsible for protecting, conserving, and managing polar bears, sea and marine otters, walruses, dugongs, and manattes [sic]. The Service has worked closely with the States to protect and manage these species. For example, the Service, in cooperation with the State of Florida and other public and private agencies, has been successful in reducing the number of manatee deaths due to navigation locks and flood gates. The number of manatee sanctuaries where boat speeds are controlled have been increased. Increased law enforcement has further reduced manatee harassment and aided salvage opportunities, and censusing techniques have been improved through research.

Under the Act, the Marine Mammal Commission and its Committee of Scientific Advisors are responsible for stimulating, coordinating and reviewing the implementation of the Act. The Commission has been instrumental in developing marine mammal management policies, developing biologically and legally constructive approaches to requests for waivers of the moratorium, carefully directing support of research to further conserve marine mammals, developing a body of information on which to base international negotiations related to marine mammal conservation, carefully and objectively exercising its overview responsibilities, guiding agencies in responsibly addressing critical issues, ensuring that agencies effectively enforce the provisions of the Act, promoting effective Federal-state cooperation, and responsibly providing an overview of activities being conducted pursuant to the Act.

Authorizations to carry out the Act will expire September 30, 1984. The draft bill would extend for three years, until September 30, 1987, the authorization of appropriations provided to the two Departments and the Commission under the Act. For fiscal year 1985, it would authorize a total of $6.092 million for the Department of Commerce, $2.23 million for the Department of the Interior, and $648,000 for the Marine Mammal Commission. These amounts are at the level contained in the President's budget request and would allow the two Departments and the Commission to carry out their research, management, enforcement, and administrative activities for marine mammals. With respect to fiscal years 1986 and 1987, the draft bill would simply authorize appropriations of such sums as may be necessary to implement the Act. This would enable the Departments and the Commission to take into consideration up-to-date resource requirements and the status of efforts to return management of marine mammal species to State jurisdiction.

100TH CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT 100–970

MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 1988

SEPTEMBER 23, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. JONES of North Carolina, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H.R. 4189]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries to whom was referred the bill (H.R. 4189) to authorize appropriations to carry out the Marine Mammal Protection Act of 1972 for fiscal years 1989 through 1993, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE

This Act may be cited as the Marine Mammal Protection Act Amendments of 1988.

SEC. 2. (a) The Marine Mammal Protection Act (16 U.S.C. 1361 et seq.) is amended—

(1) by redesignating section 114 as section 116; and

(2) by inserting immediately after section 113 the following new section:

"INTERIM EXEMPTION FOR COMMERCIAL FISHERIES

SEC. 114.(a)(1) During the period beginning on the date of enactment of this section and ending October 1, 1993, except as provided in paragraph (2), the provisions of this section, rather than sections 101, 103, and 104, shall govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States and vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)). In any event it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

Purpose of the Legislation

The legislation has several major purposes, the first of which is to provide a five year interim exemption for commercial fisheries from the Marine Mammal Protection Act's [MMPA] general taking prohibitions. Through the creation of a new section in the Act, the bill establishes new requirements and procedures for fishermen who may incidentally take marine mammals in the course of commercial fishing. Through these new procedures, it is anticipated

that sufficient information will be obtained to improve the overall management and protection of marine mammal populations.

Another purpose of the legislation is to require the Secretary of Commerce to make determinations about the status of certain marine mammal populations to determine whether they are depleted. The bill requires the development of conservation plans for the purpose of providing guidelines for restoring and conserving certain population stocks of marine mammals.

The legislation is also intended to reduce the number of porpoise killed or seriously injured in the course of yellowfin tuna fishing in the eastern tropical Pacific Ocean. By imposing additional requirements on both domestic and foreign tuna fishermen, the Committee expects that the overall mortality of dolphins will decrease, thus furthering the goals of the Act.

Finally, the bill modifies the requirements which must be met by a permit applicant for the Secretary to issue permits for scientific research and public display; authorizes appropriations for an additional five years; requires a study of the effects of seal control devices on porpoise; and requires a study on the die-off of east coast Atlantic bottlenosed dolphins.

Background and Need for Legislation

The MMPA was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at healthy population levels. In passing the Act, Congress responded to the growing concern about the decline of certain species and recognized the important role that marine mammals play in the ecosystem as well as their economic, aesthetic and recreational value.

Under the MMPA, the Department of Commerce is charged with responsibility for whales, dolphins (porpoise), sea lions and seals. The Department of the Interior has responsibility for polar bears, walruses, sea otters, manatees and dugongs. The Act establishes a moratorium on the taking of marine mammals unless the population of a mammal is determined to be at its optimum sustainable level. State management of resident marine mammal populations is preempted until such time as a state prepares a marine mammal management program consistent with the Act. Criminal and civil penalties are prescribed for violations of the Act and the importation of marine mammals and their products is subject to regulation. The Act created a three-member Marine Mammal Commission which is charged with monitoring the implementation of the Act, recommending policies to the two Secretaries and undertaking such research as is deemed appropriate.

In order to minimize the impact of commercial fishing on populations of marine mammals, the Act directed the Secretary of Commerce to establish a permit system and issue regulations which would ensure that the techniques and equipment used by fishermen would produce the least practicable hazard to marine mammals. As stated in the original Act (section 101), it shall be the conservation goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

The 1972 statute also directed the Secretary of Treasury to ban the importation of commercial fish or fish products that have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of marine mammals in excess of United States standards. The Act required the Secretary of Commerce to obtain reasonable proof from foreign governments in order to make a finding that foreign commercial fishing techniques were not resulting in kills or injuries in excess of U.S. standards.

Historically, the tuna/porpoise conflicts have given rise to some of the most controversial issues relating to the MMPA. For 30 years, purse seining has been an effective method of catching yellowfin tuna in the eastern tropical Pacific Ocean [ETP]. In the ETP, unlike other areas, yellowfin tuna swim beneath schools of porpoise or dolphins.

In order to catch these valuable tuna, fishermen encircle schools of porpoise with a seine net and, in the process, many porpoise become seriously injured or killed. The most current data shows that in 1987 60 percent of the tuna caught and more than 80 percent of the porpoise killed in the ETP were taken by foreign purse seiners. In terms of numbers, the U.S. tuna fleet killed 13,992 porpoise in 1987 while the foreign fleets killed over 103,000 porpoise.

In addition to the United States, approximately 18 other nations have purse seined in the ETP for yellowfin tuna. In order for these countries to import tuna into the United States, the Secretary of Commerce, in accordance with section 101 of the MMPA, is required to make a finding that the fishermen from these countries are using techniques and equipment that prevents mortalities of marine mammals in excess of U.S. standards. The Congo, El Salvador, Mexico, Peru, Senegal, and the U.S.S.R. have been prohibited from exporting yellowfin tuna to the United States during some period of time since the MMPA was enacted because they did not meet U.S. standards. Other countries such as Canada, New Zealand, Bermuda, and the Republic of Korea have stopped fishing in the ETP altogether. Currently, the requisite findings under section 101 are in effect for the Cayman Islands, Costa Rica, Eduador [sic], Mexico, Panama, Spain, Vanuatu, and Venezuela. Therefore, these are the only countries fishing for yellowfin tuna in the ETP which are allowed to export their catch to the United States.

In the 97th Congress, the MMPA was reauthorized and, in the process, the Subcommittee on Fisheries and Wildlife Conservation and the Environment closely examined the tuna/porpoise issue. The Committee report (H. Rept. 97–228) discussed the success of the Act in reducing the mortality of porpoise caused by domestic fishermen from 368,000 in 1972 to 18,573 in 1980. It was noted that the dramatic reduction was accomplished through improvements in gear design and fishing techniques. The report also discussed the issue of whether the goal fo [sic] the Act was being fulfilled because the incidental kill of porpoise had not been reduced to insignificant levels approaching zero. The tuna industry contended that by using the best technologically feasible equipment and methods to reduce incidental porpoise mortality, the industry was meeting the mandate of the Act.

In 1981, the Congress approved amendments which stated that the goal of the Act would be satisfied in the case of purse seine fishing for yellowfin tuna by the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. The Committee report stated that the existing goal of the Act could properly be used to stimulate new technology for reducing the incidental taking of marine mammals. To ensure that efforts to discover new technology would be undertaken, Congress adopted a provision which directed the Secretary to undertake a program of, and provode [sic] financial assistance for, research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals.

The 98th Congress approved legislation to reauthorize the MMPA and made further amendments to those sections of the Act concerning yellowfin tuna and porpoise mortalities. One of the most significant changes was to strengthen section 102(a), which ensures that nations exporting to the U.S. yellowfin tuna harvested with purse seines in the ETP have an adequate marine mammal protection program. The 1984 amendments directed the Secretary to require documentary evidence from foreign governments that they have adopted regulatory programs governing the incidental taking of marine mammals that are comparable to those of the U.S. Furthermore, the amendments required this documentation to include proof that the average rate of incidental taking of marine mammals was comparable to that of the United States.

The 1984 amendments also statutorily extended the general permit issued to the American Tunaboat Association (ATA) for an indefinite period, subject to a number of specific conditions. These conditions included changes in fishing gear, techniques and practices if required by the Secretary. Also, in order to protect the coastal spotted and eastern spinner dolphins, quotas of 250 and 2,750 respectively, were incorporated into the law. Unlike past practice, the amendments required that mortalities of these species be within, not in addition to, the overall annual quota established by the Secretary and incorporated into the permit. If either of these subquotas is exceeded, even if the overall quota had not been reached, fishing in the ETP would be terminated.

During reauthorization hearings held in 1984, it became apparent that the National Marine Fisheries Service did not have the necessary data on which to calculate the impact of incidental mortality on the populations of different stocks of porpoise. In order to obtain this information, the Act was amended to direct the Secretary of Commerce to carry out a scientific research program to monitor, for at least 5 years, population abundance and trends for ETP stocks of porpoise. The purpose of the five year program was to provide the basis for determining if porpoise are being adversely affected by incidental takes.

In recognition of the information expected from the 5-year study, the Act was amended to direct the Secretary ot [sic] make appropriate modifications to the incidental take quotas and other requirements of the ATA general permit, if it is determined that incidental take levels are having a significant adverse effect on a marine mammal population.

All commercial fishermen, including those purse seining for yellowfin tuna, are prohibited from incidentally taking marine mammals without a Federal permit authorizing such take. the [sic] National Marine Fisheries Service [NMFS] on behalf of the Secretary of Commerce is authorized by the Act to allow the take of marine mammals by the fishing industry through two mechanisms: the issuance of "general permits" for the take of relatively large numbers of marine mammals by U.S. and foreign fishermen; and the issuance of "small take exemptions" for the take of small numbers of marine mammals by U.S. fishermen only. "Taking" of marine mammals, as defined in the Act, is not limited to capturing or killing them, but includes harassment of the mammals as well.

The small take exemption provisions for commercial fishermen (section 101(a)(4)) were added in the 1981 amendments. The purpose of these measures was to allow U.S. fishermen who may in the course of fishing incidentally take small numbers of marine mammals to receive a permit to do so without NMFS following the lengthy procedures required for general permits. This Committee intended that these new provisions be available to fishermen whose taking of marine mammals was infrequent, unavoidable and accidental. The taking authorized by the small take provisions was narrowly defined to maintain the goals of the Act of reducing to insignificant levels approaching zero, mortalities caused by commercial fishermen. The taking was required to be small in numbers and NMFS was required to make a finding that the taking would have a negligible impact upon the affected species.

Unlike the small take exemptions, general permits require NMFS to estimate the population of the marine mammals for which the permits are issued, and to determine whether those populations are healthy or, in the terms of the Act, at "otpimum [sic] sustainable population" [OSP] levels. NMFS has made OSP determinations for several species, but it has not made them for many of the mammals that are likely to be taken during fishing operations. For example, OSP determinations have not been made for harbor porpoises or harbor seals, both of which are incidentally taken in the gillnet fisheries in Alaska and California.

Populations of marine mammals that are below OSP are, by definition, "depleted." There is no mechanism in the Act to allow the incidental take of depleted species by the fishing industry either through a general permit or a small take exemption. NMFS has designated northern fur seals as depleted and is considering such a designation for Steller sea lions. These two species are present in many of the fishing grounds in the Pacific northwest and Alaska and it is likely that they are taken by a number of northwest Pacific fisheries. Should both these species be designated as depleted, fishermen in these fisheries would be unable to fish. Also, NMFS recently announced it is preparing an Advanced Notice of Proposed Rulemaking on depletion of the coastal migratory stock of bottlenose dolphins in the mid-Atlantic region. Such a designation would have serious impacts on the ability of several east coast fisheries to obtain permits or exemptions.

In addition to the general permit issued to the tuna industry, general permits have been issued to the North Pacific Fishing Vessel Owners Association for the fisheries in Alaska waters and

to the North Pacific Fishing Vessel Operators for the fisheries in California, Washington, and Oregon waters. Small take exemptions have been issued to two groups on the east coast: the groundfish gillnet fleet in the northeast and the menhaden purse seine fleet located in the Atlantic and Gulf of Mexico. All current permits and exemptions allowing domestic commercial fisheries (other than the tuna industry permit) to take marine mammals expire at the end of 1988.

Within the last year, a lawsuit brought under the MMPA has complicated the relationship of the MMPA to commercial fishing operations. In July 1986, the Federation of Japan Salmon Fisheries Cooperative Association applied for a new general permit to incidentally take 5,500 Dall's porpoise, 450 northern fur seals and 25 sea lions in each of the next 5 years in the course of their Bering Sea salmon gillnet fishery. After a year of administrative proceedings, NMFS issued a permit to allow the Federation to take 6,039 Dall's porpoise over a 3-year period. NMFS denied the request to take northern fur seals and sea lions because insufficient information existed on the record to ascertain whether the populations were at OSP.

Following the issuance of the Federation's general permit, lawsuits were filed by the Kokechik Fishermen's Association, representing Alaskan subsistence fishermen, and several environmental groups to enjoin the permit. In 1987 the U.S. District Court for the District of Columbia enjoined the issuance of the permit on the grounds that it violated the MMPA. The court reasoned that NMFS violated the Act because it had failed to establish limits in the permit on the other marine mammals that would likely be taken in the course of the fishery and since it was clear that these mammals would be taken, the Court also found that NMFS failed to make the formal findings required by the MMPA that the conduct of the fishery would have negligible effects on these other species. The decision was upheld on appeal.

During the yearlong controversy over the Federation's permit, NMFS' marine mammal permit process has been in a state of paralysis. Several important issues have arisen as a result of the *Kokechik* decision with implications far beyond this one specific permit. At the heart of the issue is the Secretary's ability to issue a MMPA permit in the absence of a finding, based on adequate scientific information, that the mammal involved is at the OSP level. If insufficient data exists to make a determination on the population level of any marine mammal likely to be taken during a fishing operation, the decision suggests that a permit could not be issued. A recent decision by NOAA to refuse to grant a small take exemption to the east coast menhaden purse seine fishery, because it may take bottlenose dolphins, illustrates just some of the shortcomings of the current Act.

In summary, the provisions of the Act concerning commercial fishing operations and the take of marine mammals are inadequate. Presently the Act does not provide for any taking of marine mammals declared depleted, even if this taking is unlikely or is very small with negligible impacts on the species. In cases where there is inadequate information to make a population detemination [sic] or a negligible impact finding, the *Kokechik* decision appears to strictly limit the Secretary's ability to issue a permit or exemption. The implication of this interpretation of the Act is to render "de facto depleted" status for all these marine mammals for which population determinations have not been made.

Committee Action

H.R. 4189, a simple five-year reauthorization of the Marine Mammal Protection Act at existing levels, was introduced on March 16, 1988, by Mr. Studds, for himself, and Mr. Jones of North Carolina, Mr. Davis, and Mr. Young of Alaska. The bill was referred to the Merchant Marine and Fisheries Committee and further referred to the Subcommittee on Fisheries and Wildlife Conservation and the Environment.

On May 10, 1988, the Subcommittee held its first hearing on the bill during which testimony was received from representatives of the fishing industry, the environmental community, the National Oceanic and Atmospheric Administration and the Marine Mammal Commission. Issues discussed during the hearing included permits and exemptions for commercial fishermen, the need to reduce dolphin mortality, scientific research and public display permits.

The primary purpose of the hearing was to examine the joint agreement reached between the environmental and fishing communities. Witnesses explained that the failure of the Act to allow any take of depleted marine mammals, coupled with the *Kokechik* decision and the fact that all general permits and small take exemptions expire at the end of 1988, led to a series of meetings between industry representatives and conservationists beginning in late 1987. The common goal of these meetings was to arrive at some agreement on amendments to the MMPA which continued the protections accorded marine mammals under the Act and assured that commercial fishing operations would continue to operate while the necessary information to fulfill the purposes of the Act was compiled.

The joint proposal, presented on behalf of 25 environmental and 17 commercial fishing organizations, contained the following elements:

A three year limited exemption to the moratorium to allow incidental take of small numbers of marine mammals for which OSP cannot be determined or which are depleted;

An industry wide education program;

A revised and invigorated reporting system;

A verification system including a living marine resource observer corps;

A new data analysis system;

A research program focused on specific problems;

Recovery plans, habitat protection zones and mitigation mechanisms; and

Definite time lines and procedures to assure that the population status determination process is open, complete and efficient.

On September 8, 1988, the Subcommittee held its second hearing on H.R. 4189 for the purpose of reviewing proposed amendments to the Act concerning reducing the mortality of porpoise in the course

of yellowfin tuna fishing in the ETP. Testimony was received from representatives of NOAA, the Tuna/Dolphin Environmental Coalition, the United States Tuna Foundation, the Inter-American Tropical Tuna Commission and the Marine Mammal Commission.

Issues discussed during the hearing included the comparability standards required by the 1984 amendments, observer coverage, sundown sets by purse seiners, new or alternative fishing techniques, the status of porpoise populations, skipper performance standards and the phaseout of the U.S. quota of porpoise. Most witnesses were in agreement that further steps could and should be taken to reduce mortality by both foreign and domestic tuna fishermen. However, on the issue of legislating a reduction to zero of the U.S. quota of porpoise, every witness except the representative from the environmental coalition testified that this action could very well lead to an overall increase in porpoise mortality due to foreign fishermen abandoning their efforts to develop additional programs to protect porpoise comparable to U.S. programs.

The Subcommittee conducted a markup of H.R. 4189 on September 14, 1988. Mr. Studds and Mr. Young introduced an amendment in the nature of a substitute. After adopting a series of technical amendments, the Subcommittee adopted an amendment offered by Mr. Miller which clarified the duties of natural resource observers to be placed onboard U.S. fishing vessels.

Mr. Studds then offered an amendment calling for further reductions in the mortality of porpoise. Mrs. Saiki offered a perfecting amendment which would have statutorily reduced to zero the quota of porpoise. The Saiki amendment was defeated on a voice vote after which the Studds amendment was approved by a division vote of 8 to 7.

Mr. Anderson offered an amendment to eliminate the seal bomb prohibition in the Studds-Young substitute. The amendment was adopted by a division vote of 10 to 4.

Mrs. Saiki offered another amendment directing the Secretary to provide the National Academy of Science with all current information on porpoise populations. The amendment was adopted by voice vote.

Mr. Carper offered an amendment adopted by voice vote that directs the Secretary to do a study on the bottlenose dolphin die off on the east coast. The bill as amended was then reported to the Committee by a unanimous voice vote.

On September 15, the Committee held a markup session during which H.R. 4189, as amended by Subcommittee, was considered. Mr. Studds offered an amendment to prohibit the use of seal bombs and other explosives by yellowfin tuna fishermen. The amendment was defeated on a rollcall vote of 23 to 18. Mr. Brennan then offered an amendment to change the name of observers onboard U.S. vessels to marine mammal observers. The amendment was adopted by voice vote. The bill, as amended, was favorably reported to the House by a unanimous voice vote.

SECTION-BY-SECTION ANALYSIS

Section 1

This section establishes the short title of the Act as the Marine Mammal Protection Act Amendments of 1988.

Section 2

This section creates a new section 114 of the MMPA which provides for an interim exemption for commercial fisheries other than commercial yellowfin tuna fishing. This new section supersedes, until October 1, 1993, other sections of the Act governing the incidental taking of marine mammals by commercial fishermen to whom it applies.

Subsection (a) specifies that the new section 114 will take effect immediately on the date of enactment of this Act and will remain in effect until October 1, 1993. During that time period, this section, rather than sections 101, 103, and 104 of the MMPA, shall govern the incidental taking of marine mammals by commercial fishermen other than tuna fishermen. The subsection also provides that this interim regime will be available only to persons using vessels of the United States and vessels which have valid fishing permits issued under section 204(b) of the Magnuson Fishery Conservation and Management Act. By limiting the exception in this way, the Committee intends that the Japanese salmon gillnet fleet which has been precluded from operation in the U.S. Exclusive Economic Zone by a decision of the U.S. Court of Appeals in *Kokechik Fishermen's Association* v. *Secretary of Commerce* will not have the provisions of section 114 available to it. The Committee does not intend section 114 of [sic] disturb the holding in that case as it applies to the Japanese salmon gillnet fleet.

The Committee also notes that representatives of commercial fishing organizations have agreed to undertake and fund a special research program on germ technology and fishing practices designed to minimize the incidental taking of marine mammals, and have committed to an educational effort to inform fishermen of their rights and responsibilities under the MMPA. The Committee commends the fishing industry for this effort and hopes that as a result futurer [sic] amendments to the MMPA will be developed with a broad consensus among commercial fishermen and the environmental community.

Finally, subsection (a) retains the general goal of the MMPA that the incidental kill or serious injury of marine mammals incidentally taken should be reduced to insignificant levels approaching a zero mortality and serious injury rate.

Subsection (b) generally describes the procedure to be used for identifying categories of fisheries and registering vessels and vessel owners in order to "engage lawfully" in a fishery. The term "engage lawfully" refers solely to compliance with the MMPA and failure to comply subjects fishermen only to the penalties of the MMPA.

The Secretary is required to compile three lists of fisheries based on the frequency of incidental taking of marine mammals by vessels in those fisheries. It is the Committee's intent that these lists be compiled with the maximum amount of public participation

given the time periods involved. Further, the Committee recognizes that for the first year that this section is in effect, the Secretary may not have time to conduct adequate research to determine which fisheries should be included in which list. Therefore, the Committee intends that the list in paragraph (1)(A)(i) at a minimum include the following fisheries: Bering Sea and Gulf of Alaska groundfish trawl fisheries, Prince William Sound/Copper River salmon set and drift gillnet fisheries, Unimak Pass and False Pass salmon drift gillnet fisheries, Columbia River salmon drift gillnet fisheries, and Washington/Oregon thresher shark drift gillnet fishery; and that the list in paragraph (1)(A)(iii) include the shrimp trawl fishery in the southeastern United States and the Gulf of Mexico and the mid and south Atlantic menhaden purse seine fishery. Other fisheries should be included in the appropriate categories based on available data and with opportunity for public comment.

In addition, this subsection makes clear that fishermen have a 240 day grace period available to them in order to allow time for the Secretary to establish the caregories [sic] mentioned above and put in place the registration and reporting system. Along with the grace period, the Committee provided that only a knowing violation of the requirements in subparagraph (3)(C) that takes place before January 1, 1990, will subject a fisherman to a penalty. The Committee would not consider a knowing violation to include failure on the part of a fisherman to obtain an exemption because he was involved in a fishery the start of which occurred before the Secretary could make available appropriate exemption forms and decals or because of the remote location of the fishery, the fisherman had no way of knowing of the requirements imposed or [sic] him or did not have the ability to obtain the appropriate forms.

The Committee notes that subparagraph (3)(E) exempts vessel owners whose vessels are engaged in fisheries identified in paragraph (1)(A)(iii) from penalties for incidental taking if such taking is reported. The Committee intends that vessel owners in this category make all reasonable efforts to release animals unharmed.

Further, notwithstanding the grace period, the incidental taking of California sea otters and the intentional lethal taking of Steller sea lions, cetaceans, or any marine mammal from a population stock designated as depleted is strictly prohibited. In this regard, the Committee intends that the provisions of this section do not supersede, or otherwise affect, any provisions of the Endangered Species Act or section 1 of Public Law 99-625 which established a California sea otter translocation and zonal management program designed to bring about their recovery. In addition, the exemption to allow intentional lethal taking must be exercised only in the most limited circumstances when, after all reasonable nonlethal methods of deterrence have been exhausted, killing an animal is necessary to protect catch, gear, or human life.

Finally, paragraph (5)(C) of subsection (b) authorizes the Secretary to charge a fee to cover the administrative costs of granting an exemption. It is the clear intent of the Committee that the amount of any fee shall not exceed reasonable administrative costs; in other words, the Secretary cannot use this provision to offset the cost of an observer program or a data management system, charge

fees which cover the cost of research, or in any other way use this authority to fund programs for which authorizations are made available.

Subsection (c) imposes a reporting requirement on fishermen holding an exemption issued under subsection (b) and generally describes the information which must be submitted to the Secretary. The Committee intends the process to be simple incorporating, for example existing logbook recording mechanism. Such reports should include any information on marine mammals released unharmed from fishing gear, marine mammal sightings of possible, and any physical contact and intentional harassment such as intentional pursuit or use of acoustic deterrence devices. The Committee expects the Secretary to make use of this information and not ignore it, as has occurred in the past.

Subsection (d) requires the Secretary to establish a program to enhance the quality of and to verify information received from reports submitted by vessel owners. The key to this program is the establishment of an education program so that vessel owners will submit reports containing useful information. The Committee expects the Secretary to work closely with fishermen's organizations and utilize the services of the Marine Advisory Program to accomplish this goal.

Subsection (e) establishes and authorizes funds for an observer program to conduct onboard data-gathering activities on vessels engaged in those fisheries with a frequent incidental taking of marine mammals. Obsevers [sic] are to be deployed so that a minimum of 20 percent and a maximum of 25 percent of the effort in given fishery is observed during the course of a fishing season. The percentage should be determined based upon the average number of vessels in the fishery during the season. This could result in the number of observers deployed in a fishery changing during the course of a fishing season. The Committee notes that representatives of the commercial fishing industry from the Pacific Northwest and Alaska and representatives of environmental organizations, in testimony before the House and the Senate, jointly agreed that that [sic] trawl fisheries of the Bering Sea and the Gulf of Alaska that are listed under subsection (b)(1)(A)(i) should be covered by at least 24 observers during the first two years that the observer program is in effect.

In distributing observers among fisheries and among vessels within a fishery, the Secretary is to be guided by specific standards listed in paragraph (2) to ensure fair and equitable treatment. Further, when assigning observers to specific vessels, the Committee intends that the Secretary work with Regional Fishery Management Councils or States, as appropriate, and with the fishermen's organizations to ensure that the program runs smoothly and with a minimum cost. Thus, for example, the Secretary should consult with fishermen's organizations to see what vessels are available and suitable for carrying observers. At the same time, the Secretary must ensure that, by accepting the suggestions of organizations regarding vessel suitability, the data obtained will be reliable and not biased by differences in vessel operation or fishing location.

Although the primary purpose of the observer program is to collect data on incidental take of marine mammals, observers are not necessarily limited to this activity. In certain instances, a Regional Fishery Management Council or a State may wish to take advantage of the presence of an observer to obtain other scientific or biological information that will assist them in performing their resource conservation and management duties. In such instances, they can request that the Secretary have observers collect such other data. It is the Committee's intent that the Secretary honor such requests. In the case of a Regional Fishery Management Council such a request should be made by the Council as a whole in accordance with Council procedures in the exercise of its authority under section 302(b)(6) of the Magnuson Fishery Conservation and Management Act and not by an individual Council or staff member.

The Committee recognizes that situations may occur where deployment of an observer is not possible or practical. Thus, the requirement for observer coverage is conditioned in paragraph (5). For example, the Secretary may be able to achieve the need to obtain statistically reliable information in a fishery that involves the delivery of fish directly to a floating processor by stationing an observer on board the processor rather than on one or several catcher vessels. This is particularly true in the case of over-the-side joint ventures where the foreign processing vessel already has an observer on board under the provisions of other law. However, an observer on board a processor must be able to accurately verify incidental taking of marine mammals or obtain other biological data if requested to do so by a Council or a State. If needed data cannot be obtained, then observers must be deployed on the harvesting vessel.

Situations may also occur where a vessel is too small to carry an observer safely, where an observer will displace a crewmember, or where fishing gear cannot be operated safely because of the presence of an observer. Such situations also absolve the Secretary of observer deployment requirements. However, this does not necessarily preclude placement of an observer on board a vessel with insufficient space to quarter the observer if the vessel does not remain at sea overnight.

The Committee also recognizes that the Secretary may not be able to employ, or contract for sufficient personnel to fully staff the observer program, or that funds may not be appropriated to cover the full cost of an observer program. The Committee considers these events to be beyond the control of the Secretary. In such circumstances, paragraph (3) lists priorities that should be met in allocating the limited resources of the Secretary.

Paragraph (6) stipulates that vessel owners shall not be held liable for injuries or fatalities suffered by observers while deployed on board a vessel with two exceptions: an observer may bring a civil action against an owner for the owner's willful misconduct; and the exemption from liability does not apply if the observer is formally engaged by the owner to perform duties on board the vessel of the sort that would normally be performed by a crewmember. The term "engaged" is used in the sense that a formal contract or an exchange of money is involved. Thus, an observer who

voluntarily provides minimal assistance in the operation of a vessel, such as by handling a line or cooking a meal, will not be considered to be engaged unless he is paid or employed to do so. This paragraph also applies the limitation on liability to owners of tuna vessels required to carry observers under section 104 of the MMPA.

Finally, the Committee does not intend that observers deployed under this subsection necessarily meet other requirements for observer coverage that may be mandated under other laws or regulations. Thus, for example, the requirement for 100 percent observer coverage on foreign fishing vessels under subsection 201(i) of the Magnuson Fishery Conservation and Management Act are not altered by the requirements of this subsection, nor are any similar requirements imposed by State law or applicable fishery management plans. At the same time, if the Secretary can effectively utilize observers deployed under other authorities to meet the provisions of this subsection, he should do so.

Subsection (f) requires the Secretary to establish an alternative observer program for those fisheries where observer coverage is required but where deployment of observers on board fishing vessels in sufficient numbers to meet the 20 percent minimum standard cannot be accomplished. For example, salmon gillnet fishermen in Alaska must by State law use vessels which are too small to carry observers safely. Thus, observation could probably best be accomplished by using a patrol vessel stationed in the area from which observers can observe fishing operations. The alternative program should also be used for fisheries where observer coverage is not required but where the use of the alternative program will provide the Secretary with valuable marine mammal data. This program can be used to collect other biological data if an appropriate request is made by a Council or State.

Subsection (g) provides the Secretary with both emergency and general authority to impose conditions and restrictions on exemptions issued to fishermen in order to prevent significant adverse impacts on marine mammal population stock.

The Committee intends that the Secretary's emergency authority be used only when no alternative is available to prevent an immediate and significant adverse impact on a marine mammal population stock. Further, the Secretary must consult fully with appropriate Regional Fishery Management Councils and State fishery managers before taking any emergency action. In addition, such action shall not, unless absolutely necessary, interfere in any way with existing fishery management plans or State conservation and management programs. Any action taken should be as brief in duration and nonintrusive in nature as possible and shall take into account the economics of the fisheries that may be affected and the availability of existing technology to resolve emergency problems. At the same time, the Secretary may also promulgate emergency regulations which restrict the number of marine mammals that may be taken, the season or other period of time when marine mammals may be taken, the manner and location in which marine mammals may be taken, and the use of fishing techniques which are found to cause undue fatalities to any species of marine mammals.

The Committee recognizes that a situation may arise where a large number of Steller sea lions or northern fur seals may be lethally taken by a fishery occurring early in the year, thus potentially preventing other fisheries from operating. If such a situation occurs, the Committee intends that the Secretary work with the North Pacific Fishery Management Council, the State of Alaska, and affected fishermen to develop a system of allocating lethal takes among fisheries. Such a system shall not be used to accomplish other fishery management or social or economic objectives, nor shall it relieve the Secretary of the legal obligation to protect marine mammals as required by this Act.

This subsection also provides the Secretary with general authority to impose conditions and restrictions on exemptions. This authority shall be used where appropriate to meet the requirements of this Act. Any conditions or restrictions imposed which affect fishing operations shall avoid affecting State fishery management authority or fishery management plans and shall only be imposed after full consultation with Councils and States and notice and opportunity for public comment. The range of conditions and restrictions which may be imposed include those noted above in the discussion of the Secretary's emergency authority.

By enacting this subsection, the Committee does not intend to alter the Secretary's clear statutory authority to manage and protect marine mammals. The Committee recognizes that authority for fisheries management lies with the States and, to the extent established by law, with the Regional Fishery Management Councils. The Committee intends the Secretary to work cooperatively with such management entities on matters affecting fisheries but not to ignore his responsibilities under this Act.

Subsection (h) requires the Secretary to design and implement an information management system capable of analyzing and processing information on incidental taking of marine mammals. Because information must be made available to the public in a timely manner, the Committee intends that the Secretary develop procedures to adequately analyze reports received from fishermen and not simply ignore them.

Subsection (i) provides the Secretary with authority to enter into contracts to carry out certain of his responsibilities under this Act and to utilize the services and programs of other entities such as States, universities, Regional Fishery Management Councils, and other Federal agencies. The Committee intends that the Secretary utilize this authority and not attempt, for example, to create a new licensing system if a State licensing system can be used to register fishing vessel owners and issue exemptions. Further, the Committee recognizes that the Secretary already has a program established to collect and compile observer data from foreign fishing vessels. If practicable, the Secretary should utilize this program in carrying out the requirements of subsection (e).

Subsection (j) imposes restrictions on releasing confidential or proprietary business information to the public. If the Secretary enters into a contract or other agreement to collect or analyze data submitted by observers or obtained from reports, the Committee intends that the contractor or other entity be considered a Federal employee and thus entitled to receive the data in raw form but be

bound by the other restrictions on public release of data in this subsection. Further, the Committee understands that requests for data have been submitted to the Secretary under other authorities and those requests have been denied because the Secretary did not wish to provide data in the form requested, even though release of the data would not have violated confidentiality provisions. The Committee intends that data collected under this section be made available to the public as long as the identity or business of any person is not disclosed.

Subsection (k) requires the Secretary to issue appropriate regulations to carry out the purposes of this section. As is generally provided for in the MMPA, the Committee expects that the Secretary will consult with the Marine Mammal Commission regarding such regulations and the Secretary of the Interior where appropriate.

Subsection (l) sets up a mechanism whereby the Congress, based on scientific information, public participation, and recommendations from the Secretary, can, if it chooses, establish a permanent system to deal with the incidental taking of marine mammals in the course of commercial fishing.

By February 1, 1990, the Chairman of the Marine Mammal Commission is required to transmit to the Secretary and make available to the public recommended guidelines to govern the incidental taking of marine mammals by commercial fishermen after October 1, 1993. Because the Marine Mammal Commission is a scientific body, the Committee intends that these guidelines be scientific in nature; that is, they should not deal with the economics of fisheries or allocation of fishing privileges. Further, they must be based on sound principles of wildlife management and must only be issued after full consultation with all interested parties, including but not limited to those individuals and groups interested in the conservation of marine mammals and those involved in all segments of the U.S. commercial fishing industry.

No later than February 1, 1991, the Secretary shall publish in that Federal Register for public comment a suggested regime that, if authorized by further action of the Congress, should govern the incidental taking of marine mammals by commercial fishermen. The Committee intends that publication be preceded by extensive consultation with all interested parties, including all segments of the U.S. commercial fishing industry and especially the Secretary of the Interior in regard to those species under the jurisdiction of that Secretary. The Committee intends that the Secretary include in the consideration of permissible biological levels of take discussions of the economic and sociological impacts of the regime.

Following consideration of public comment and after consultation the Marine Mammal Commission on any scientific aspects of the suggested regime, but in no event any later than January 1, 1992, the Secretary shall submit his recommendations to Congress.

Subsection (m) requires the Secretary to consult with the Secretary of the Interior prior to taking actions or making determinations under this section which may affect population stocks of marine mammals that are the responsibility of the Secretary of the Interior. The Committee recognizes that the Secretary of the Interior is responsible for certain species of marine mammals, such as Alaskan sea otters, that may be affected by commercial fishing op-

erations and the Committee does not intend to reduce or alter that responsibility. At the same time, the Committee recognizes that the Secretary of Commerce has clear authority over matters relating to marine fisheries and does not intend by this subsection to reduce or alter that responsibility. Given these respective responsibilities, the Committee expects the Secretary of Commerce to communicate to the maximum extent practicable with the Secretary of the Interior on matters involving those species under the jurisdiction of that Secretary. Thus in the case of any species under the jurisdiction of the Secretary of the Interior, the Committee expects the Secretary of the Interior to notify the Secretary of Commerce of any problems that may be occurring regarding commercial fisheries and to provide suggestions for resolving those problems. The Committee intends the Secretary of Commerce to give significant weight and due deference to the advice and recommendations from the Secretary of the Interior, given the expertise of the Secretary of the Interior on species under that Secretary's jurisdiction. However, the Committee intends that the Secretary of Commerce have ultimate administrative authority for taking action involving marine fisheries. The Committee suggests that the Departments enter into a formal memorandum of understanding to further delineate this division of responsibility.

Subsection (n) clarifies that the owner of fixed fishing gear, such as a set gillnet attached to the shore which incidentally takes marine mammals, shall be considered a vessel owner for the purposes of this section and thus will be subject to the same requirements and restrictions as any other vessel owner.

Subsection (o) defines terms used in this section.

Finally, the Committee recognizes that due to the extent of commercial fishing operations and the number of marine mammal population stocks off the coast of Alaska, future decisions on how to govern the incidental take of marine mammals in the course of commercial fishing will be especially important in this area. As a result, the Committee finds that there is an immediate need to expand consultation and cooperation in the conservation of marine mammals off the coast of Alaska. This area is inhabited by large and internationally significant populations of marine mammals. Effective consultation and coordination can help to ensure that the populations of marine mammals remain healthy and abundunt [sic]. Where there are concerns with some species, planning can address those problems.

The Secretaries of Commerce and Interior should work closely with the State of Alaska and affected user groups, especially Alaskan Natives, to develop effective conservation programs for marine mammals. These could include assessments of populations and their fluctuations, essential habitat, threats to species and habitat, and research and management needs.

Section 3

Section 3(a) adds a new subsection 115(a) to the MMPA which directs the Secretary in reviewing the status of any population stock of marine mammals to follow a prescribed series of steps designed to ensure early and adequate public notice, comment and participation in the review process. The purpose of this subsection is to

ensure that changes in status designations are efficient, provide for timely input from interested parties—including the fishing industry and environmental community—and occur in a timely manner. The Secretary is directed to comply with the requirements of paragraph (2) of this subsection for all status reviews. The Committee notes that this process is similar but not identical to the process by which species are determined to be threatened or endangered under the Endangered Species Act of 1973 (16 U.S.C. 1533).

Paragraph (2) of this subsection directs the Secretary, prior to the issuance of any proposed rule regarding a status determination, to publish a call for information from concerned parties and academic institutions. This is to ensure that the Secretary has access to all the best data available on a species early in the status review process before even an initial determination has been made. The Committee intends the Secretary to utilize, to the extent feasible, informal working groups. The Committee is aware that the convening of similar groups on an informal basis has been useful in the past in making status determinations and encourages the use of such groups as early as possible in the review process. The Committee intends that the Secretary issue general invitations to enable all interested parties to the extent practicable, to participate in any such working group and that a record of any working group meeting be made available to the public.

Paragraph (3) of this subsection outlines the procedures the Secretary shall follow upon receipt of a petition to complete the status review as expeditiously as possible. It further allows the Secretary to expedite the issuance of final rule under this subsection, if it is determined that there is substantial information warranting issuance of such a rule and that delay would post a significant risk to the health of the marine mammal species or population stock.

Section 3(b) directs the Secretary to develop conservation plans for North Pacific fur seals by December 31, 1989, for Steller sea lions by December 31, 1990, and for any depleted species or stocks as soon as possible. Each plan shall have the purpose of conserving and restoring the species or stock to its optimum sustainable population, shall be modeled on recovery plans required under the Endangered Species Act, and shall be expeditiously implemented and regularly updated. It is the Committee's intent that conservation plans outline specific, achievable actions to further the purposes of the plan. The Committee itends [sic] that conservation plans not be an assessment of the current situation, but rather provide a clear strategy, including research needs, of the conservation and restoration of the species.

In the event of an unanticipated crisis regarding a species other than North Pacific fur seals or Steller sea lions, the Secretary of Commerce is expected to give priority to preparing a conservation plan for that species after opportunity for public comment.

Section 4

Section 4 adds a number of provisions to the Act for the specific purpose of reducing the morality [sic] of porpoise in the course of fishing for yellowfin tuna in the ETP.

Subsection (a) adds additional requirements that the Secretary must consider when making a finding as to whether a foreign

nation is taking measures comparable to that of the United States in reducing the take of porpoise. The Secretary shall not find that a foreign nation is comparable unless it has met the following standards: it has adopted a regulatory program containing the same prohibitions applicable to U.S. vessels, within 180 days after the United States has imposed such restriction on its vessels; that the average kill rate of its fleet is no more than two times the U.S. rate during the same period of time by the end of 1989 and no more than 1.25 the U.S. rate by the end of 1990; the percentage of eastern spinners and coastal spotted dolphin does not exceed 15 percent and 2 percent respectively of its total number of marine mammals taken in any year; its fishing operations are monitored, to the same degree as U.S. vessels, by an observer program of the Inter-American Tropical Tuna Commission [IATTC] or an equivalent international program; and it complies with all reasonable requests by the Secretary for cooperation in scientific research.

While the Commission is disappointed that the interim final regulations implementing the 1984 comparability amendments to the Act were just recently issued, it expects that these new amendments will be incorporated into the final regulations immediately. Recognizing that the foreign fleets harvest 60 percent of the yellowfin tuna in the ETP but kill 80 percent of the porpoise, the Committee intends these new requirements to reduce the foreign take of marine mammals, similar to those reductions made by the U.S. fleet.

Subsection (a) also directs the Secretary to initiate embargo proceedings against any intermediary nation wishing to export yellowfin tuna to the United States if the nation does not prohibit, within 60 days of the date the United States has imposed an embargo, the importation of yellowfin tuna into its own country from those nations embargoed by the United States. The Committee strongly supports this provision in order to prevent embargoed nations from circumventing U.S. restrictions, thus weakening the effectiveness of U.S. law. If the United States embargoes yellowfin tuna and tuna products from any nation, the Committee expects that all yellowfin tuna products, including canned tuna containing any yellowfin, whether caught in the ETP or not, will be embargoed. If a third party nation does not embargo the same products, they will not have access to the U.S. market for those products.

Finally, subsection (a) requires the Secretary, within 6 months after any embargo of yellowfin tuna, to certify such fact to the President. This certification will then allow the President to ban any type of fish and fish product from the embargoed nation, in accordance with the "Pelly Amendments" to the Fishermen's Protective Act of 1967.

Subsection (b) directs the Secretary, through the Secretary of State, to initiate negotiations with foreign nations, for the purpose of protecting marine mammals. For those nations whose vessels harvest yellowfin tuna in the ETP, the Secretary is directed to work through the IATTC or similar international organizations, to develop agreements on cooperative research into alternative fishing methods and population studies, limitations on incidental take levels, and the use of best marine mammal safety techniques and equipment for the purpose of reducing mortality.

Subsection (c) directs the Secretary to include a description of the results of these discussions in the annual MMPA report to Congress.

Subsection (d) amends the conditions under which the extension of the general permit issued to the ATA is granted. Specifically, the Secretary is directed, by January 1, 1989, to promulgate regulations to ensure that purse seine fishing is completed no later than 30 minutes after sundown, thus preventing the high porpoise mortality associated with sundown sets. The Committee expects that in implementing this provision, the Secretary may prohibit the net skiff from being deployed at a certain time before sundown in order to ensure that fishing is completed by 30 minutes after sundown. The Secretary may also require the use of certain gear, such as snap rings, to expedite fishing operations, thus minimizing the impact on porpoise. The Committee has not specifically defined the phrase "sets of the purse seine net on marine mammals are completed", because it expects the Secretary to do so through the rule-making process. However, it is the Committee's intent in banning sundown sets to eliminate those fishing operations which lead to higher than average mortality rates and would expect that the regulations not be based on the average time that it takes to complete a tuna set. Rather, the Committee intends that the back-down procedures would be completed and the net would be close to the seine vessel by 30 minutes after sundown, recognizing that the net may not be totally aboard the vessel. This would ensure that tuna fishermen have completed those procedures necessary to release porpoise in the net before dark while allowing them to finish taking tuna out of the net.

Subsection (d) also authorizes the Secretary to waive any terms or conditions of the general permit to a specific certificate holder for the purpose of conducting experimental fishing operations. The Committee anticipates these provisions will be useful in the development of new or alternative fishing gear and techniques.

Subsection (d) also requires the Secretary, before the beginning of the 1990 season, to develop and implement a system of performance standards for certificate holders. The purpose of this system is to allow the Secretary to identify certificate holders whose incidental rate of marine mammal mortality is consistently and substantially higher than the average rate of the fleet. By identifying these skippers, or in some cases vessels, the Secretary will be able to more effectively use the authority to require training, physical improvements on vessels, or to suspend or revoke certificates.

The Committee is aware of the progress made by the skippers panel established under the ATA general permit. However, testimony was received that indicated the continuing and substantial differences in mortality rates among various skippers and vessels. The performance standards, which shall include levels and rates of incidental mortality, are intended to assist the Secretary and the industry to narrow these differences. The terms "consistently" and "substantially" are used to make clear that the Committee does not want a skipper who may have an excellent record but subsequently suffers one disaster set to be identified as a poor performer. Rather, by using these terms or standards, the Committee expects the Secretary to identify those skippers or vessels having a

continuing and significant incidental mortality rate above the fleet average.

Subsection (d) requires 100 percent observer coverage for all certificated yellowfin tuna vessels through 1991. After the 1991 fishing season, the Secretary may require a less extensive observer program, so long as it does not prevent the purposes and policies of the Act from being satisfied.

Lastly, this subsection requires the Secretary, in addition to his present responsibility to consult with the Marine Mammal Commission, to convene annual meetings with representatives from the conservation and scientific communities, as well as the tuna industry, to review the results of efforts to reduce porpoise mortality. Before April 1, 1992, the Secretary is required to submit to the Senate Commerce Committee and the House Merchant Marine and Fisheries Committee a comprehensive report on the results of the research programs, performance standards, observer programs, prohibition on night fishing and development of alternative fishing techniques and a discussion of whether further reductions of porpoise mortality are economically and technologically feasible. If porpoise mortality has not been substantially reduced by these efforts, the Secretary is required to recommend specific legislative proposals and other action to accomplish the goals of the Act.

Subsection (e) requires the Secretary, before the beginning of the 1990 fishing season and annually thereafter, to determine the availability of alternative fishing techniques in order to reduce the mortality of porpoise. Based on this determination and consistent with section 104(h)(2)(B), the Secretary is required, before the beginning of the 1990 season and every season thereafter, to modify the terms of the general permit issued to the tuna industry. In order to meet the goals of the Act, these modifications must include a reduction in the number of marine mammals taken incidental to yellowfin tuna fishing, a reduction in the percentage of sets made on marine mammals, or a requirement to use alternative fishing gear or techniques. The Committee expects that as a result of these annual modifications, consistent with the other provisions of the Act, further reductions in the mortality of porpoise will be realized and the goals of the Act fulfilled.

Subsection (f) directs the Secretary to request the National Academy of Sciences, though the issuance of a contract, to identify new alternative tuna fishing techniques designed to reduce or eliminate the incidental mortality of porpoise and, within one year, submit a research, development, and implementation plan of alternative fishing techniques to the Congress. Also, the Academy is directed to include in the report a review of the most recent data on porpoise populations, trends, and abundances.

Section 5

Subsection (a) amends section 109(h) of the MMPA to allow the importation of marine mammals into the United States for the purpose of providing medical treatment not otherwise available to them in the country of export. It also requires that marine mammals imported under such circumstances be returned to their natural habitat in those cases in which it is feasible. In determining whether it is feasible to return an animal to the wild, the Secretary shall consult with the attending veterinarian and curatorial staff of the institutions providing the medical treatment. He shall also consider the likelihood of whether the animal will successfully readapt to life in the wild and the possibility that the animal may transmit a contagious disease to animals in the wild.

Subsection (b) amends section 102(b) of the MMPA by creating an exemption to the prohibition against the importation of marine mammals that were pregnant or nursing at the time of taking, or that are less than eight months old, if the importation is necessary for the protection or welfare of the animal. This waiver would permit the importation of animals which have been orphaned and could not survive in the wild or immature animals which are sick or wounded if the Secretary determines that the importation is necessary for the protection or welfare of the animal.

Currently, under the MMPA, such marine mammals cannot be imported even if the alternative is the death of the animal. In some instances, an adult animal of the same species could be imported for public display. This anomaly has recently been demonstrated in the case of orphaned polar bear cubs from Canada. Canadian officials have found it necessary to remove nuisance adult polar bears which represent a threat to public safety. In some instances, the lethal removal of a female bear results in a cub being orphaned and Canada does not have adequate facilities for the permanent care of captured bears and cubs. This amendment would allow importation of these marine mammals if all other conditions for a public display permit are met.

A permit would not be issued in instances which are inconsistent with the purposes of the MMPA. Furthermore, all importations of marine mammals, including those pursuant to this section, are subject to the requirements of the Lacey Act and other applicable law regarding humane and healthful transport of wild mammals and birds.

Subsection (c) amends section 101(a) of the MMPA by authorizing the instance of permits for taking and importing marine mammals for purposes of enhancing the survival or recovery of a species or stock.

Subsection (d), in general, amends section 104(c) of the MMPA by modifying the requirements for the issuance of public display and scientific research permits and by establishing requirements for the issuance of permits for enhancing the survival or recovery of a species or stock.

Subsection (d)(2) provides that to be eligible for a public display permit, an applicant must offer a program which includes education or conservation as a component of such program. It is clear, however, that education or conservation need not be the sole component of a qualifying program. In addition, this paragraph requires that the Secretary determine that the program is based on professionally recognized standards of the public display community for it to be acceptable, and that the applicant's facilities be open to the public on a regularly scheduled basis. This new requirement will be applicable only to permits issued or modified after the date or enactment of this provision.

Education is an important tool that can be used to teach the public that marine mammals are resources of great aesthetic, rec-

reational and economic significance, as well as an important part of the marine ecosystem. It is important, therefore, that public display permits be issued to entities that help inform the public about marine mammals, as well as perform other functions. However, it is the intent of the Committee that the Secretary not use this section to regulate the content of eduation [sic] or conservation programs.

Public display programs should be based on professionally recognized standards of the Public display community. Such standards include, but are not limited to those of the American Association of Zoological Parks and Aquariums [AAZPA]. AAZPA accredited facilities are permanent institutions which own and maintain captive wild animals that represent more than a token collection, are under the direction of a professional staff, provide its collection with appropriate care, and exhibit them in an esthetic manner to the public on a regularly scheduled basis for the purposes of education, conservation, scientific studies and recreation. Standards which approximate those of the AAZPA, or which the Secretary otherwise finds acceptable, meet the requirements of this section.

An applicant's facilities must also be open to the public on a regularly scheduled basis. This is intended to mean regular and predictable hours so that access is reasonably convenient to the public. A seasonal facility open to the public on a regularly scheduled basis during its open season will meet this requirement.

Permits may continue to be issued to public and privately owned zoological parks and oceanariums, as well as other qualifying institutions. Further, it is clear that appropriate enterprises include both profit and nonprofit institutions.

Finally, subsection (d)(3) provides that permits for scientific research may be issued only to an applicant conducting research to further a bona fide scientific purpose that does not involve unnecessary duplication. The National Marine Fisheries Service regulations already use the term "bona fide" as one of the criteria to be considered before issuing a scientific research permit (50 CFR 2167.31(a) [sic]). The addition of this language is not intended to substantively change the criteria for granting scientific permits and is merely codifying the regulations. The Committee expects the Secretary of the Interior to use a similar standard when promulgating his regulations under this section.

Research permits may not be issued for unnecessary duplication of research. This is to ensure that permits are not issued for numerous requests for takings of marine mammals if the research is not expected to enhance the body of scientific knowledge. Unnecessary duplication is not synonymous with replication. The repetition of an experiment or procedure to test the results of the research is recognized as crucial to science.

In the case of scientific research that would involve the killing of marine mammals, permits may only be issued if it is determined that the research cannot reasonably be done using alternative, nonlethal techniques. Further, in the case of lethal research involving depleted marine mammals, the research must either fulfill a critically important research need or directly benefit the effected species or population stock.

Subsection (d)(4) provides that the Secretary may issue a permit for enhancing the survival or recovery of a species or stock only if

he determines that the taking or importation is likely to contribute significantly to the survival of the species and is consistent with any applicable conservation or recovery plan. If no recovery or conservation plan exists, the Secretary is required to evaluate the proposal on the basis of the factors that would be addressed in such plan.

The amendment allows for captive maintenance of depleted species, if the Secretary first makes a number of determinations. Also, the Secretary may allow the public display of such marine mammals only if he determines that the display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.

Section 6

Section 6 authorizes appropriations to the Department of Commerce, the Department of the Interior, and the Marine Mammal Commission to carry out their responsibilities under this Act, other than the Secretary of Commerce's responsibility to provide observer coverage for commercial fishing vessels, through fiscal year 1993.

Section 7

Section 7 requires the Secretary of Commerce to conduct a study on the effects of seal control devices (so-called "seal bombs") and other explosive devices used in the course of commercial yellowfin tuna fishing. The study should determine whether the use of such devices during yellowfin tuna fishing operations causes damage to the auditory system of porpoise or cause mortality. The study should also look at alternatives to these devices, including different fishing techniques, if it is determined that they cause harm or increase mortality. The results of the study must be transmitted to the House and the Senate no later than 2 years after date of enactment of this Act. The Committee notes that the requirement for conducting this study does not absolve the Secretary of any other requirements imposed on him under the MMPA.

Section 8

Section 8 requires the Secretary of Commerce to conduct a study regarding the die-off of east coast Atlantic bottlenosed dolphins which occurred in 1987 and 1988. A plan for conducting the study must be submitted to the House and the Senate before January 1, 1989, and the final report on the study must be submitted before January 1, 1990. The Committee notes that the Secretary has already begun preparations for such a study and does not intend this section to disrupt or unduly modify existing study plans.

Inflationary Impact Statement

Pursuant to Clause 2(1)(4) of Rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 4189 would have no significant inflationary impact upon prices and costs in the operation of the national economy.

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MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 1988

OCTOBER 7 (legislative day, OCTOBER 6), 1988.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2810]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2810) to amend the Marine Mammal Protection Act of 1972 and to authorize appropriations for that Act, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

PURPOSE OF THE BILL

The primary objective of the legislation is to provide for assessment and reduction of adverse effects of commercial fishing operations on marine mammal populations. The bill amends the Marine Mammal Protection Act (MMPA) and establishes a five-year program to allow incidental taking of marine mammals by commercial fishermen and to collect information regarding fishery–marine mammal interactions. Specific measures to reduce the number of porpoise killed or injured by tuna fishermen in the eastern tropical Pacific Ocean are included. In addition, S. 2810 extends the authorization of appropriations for five additional years; establishes procedures for determining the status of marine mammal populations; modifies permit requirements for scientific research, public display, and population enhancement activities; and requires a study on the epidemic affecting Atlantic bottlenose dolphin. Finally, the bill amends the Fishermen's Protective Act of 1967 and the Fur Seal Act of 1966.

Background and Needs

The MMPA was enacted in 1972, in response to increasing popular sentiment and growing concern for the welfare of marine mammals. The Act recognizes that marine mammals play an important role in marine ecosystems and that they are significant recreational and aesthetic resources. The MMPA also notes the adverse impact of human activities on some marine mammal populations, and the need to restore those populations that have been severely depleted. The central feature of the Act is a moratorium on the taking of all marine mammals by persons subject to the jurisdiction of the United States. This protection prohibits harassment of animals, as well as hunting or capturing them. In addition, imports of marine mammals or marine mammal products into the United States are banned.

While the Act places a moratorium on the taking or importation of marine mammals, it also establishes procedures through which that moratorium may be waived. Such a waiver is most commonly achieved through issuance of a permit which indicates the number and types of marine mammals which may be taken. Limited exceptions to the moratorium are provided for scientific and public display purposes, for taking by Alaskan natives of the north Pacific and Arctic coasts, and for takings incidental to commercial fishing and other operations or pursuant to international treaty obligations.

In most instances, the MMPA relies upon the condition of a marine mammal population to determine whether taking may be permitted. A stated goal of the MMPA is to maintain marine mammals at optimum sustainable population (OSP) levels. As defined in regulations, a species or stock is considered to be at its OSP level if it is within a range between its maximum net production level (MNP) and the carrying capacity of the environment. The MNP is often considered to be 60 percent of historic, unexploited population levels. Species listed as endangered or threatened under the Endangered Species Act, and species which are below OSP levels, are designated as depleted under the MMPA. For the most part, taking of animals from depleted species or populations is prohibited.

Primary responsibility for implementing the MMPA is shared by the Secretaries of Commerce and Interior. The Commerce Department, through the National Marine Fisheries Service within the National Oceanic and Atmospheric Administration (NOAA), has authority with respect to whales, porpoises, seals, and sea lions. The remaining marine mammal species (walruses, polar bears, sea otters, and manatees) are managed by the Department of the Interior through the U.S. Fish and Wildlife Service (FWS). Each promulgates regulations, issues permits, conducts scientific research, and enforces the provisions of the Act relating to species under its jurisdiction. In carrying out their responsibilities, the Secretaries consult with the Marine Mammal Commission, an independent advisory agency created by the MMPA. Consisting of three part-time Commissioners, the Commission reviews and develops recommendations concerning actions and policies which affect marine mammals.

The authorization of appropriations for the MMPA expires at the end of the current fiscal year. In the 1984 reauthorization legislation, the Department of Commerce was authorized to receive annual funds of $8.8 million for the five-year period. Funding for the Department of the Interior was authorized to increase incrementally from $2 million in fiscal year (FY) 1984 to $3 million in FY 1986, remaining at that level thereafter. The authorization of appropriations for the Marine Mammal Commission has remained constant, at $1 million each year, since FY 1983. The table below shows the amounts appropriated for marine mammal-related activities. Figures given for FY 1989 are the President's budget request:

[Dollar amounts in millions]

	Fiscal year—				
	1985	1986	1987	1988	1989
NOAA	$8.13	$8.63	$9.28	$8.68	$7.32
FWS	1.29	1.82	2.38	2.67	1.89
Commission	0.93	0.86	0.90	0.95	0.93

INCIDENTAL TAKE OF MARINE MAMMALS BY COMMERCIAL FISHERMEN

Although the Act permits the incidental taking of marine mammals in the course of commercial fishing operations, the immediate goal is to reduce such taking of insignificant levels approaching a zero mortality and serious injury rate. Consistent with this goal, the Act directed the Secretary of Commerce (Secretary) to establish a permit system and issue regulations which would ensure that the techniques and equipment used by fishermen minimize hazards to marine mammals. All commercial fishermen, including those purse seining for yellowfin tuna, are prohibited from incidentally taking marine mammals without a Federal authorization for the taking.

The Act provides two mechanisms through which NOAA, on behalf of the Secretary, may provide such an authorization. First, a "general permit" may be issued which provides for the take of relatively large numbers of marine mammals by U.S. and foreign fishermen. Second, a "small-take exception" may be issued to citizens of the United States to take small numbers of marine mammals if such taking has only a negligible effect on the population. Under existing provisions of the MMPA, neither general permits nor small-take exceptions may be issued to fishermen for the incidental take of marine mammals from populations that are depleted.

Added to the MMPA in 1981, the small-take exception is available to those U.S. fishermen who accidentally take small numbers of marine mammals. The Secretary is not required to find that the affected population is at it OSP level in order to make a determination of negligible impact and grant the exception. As a result, procedures for obtaining such an exception are simpler and require less time than those required for obtaining a general permit.

By contrast, before issuing a general permit, the Secretary is required to estimate the abundance of the marine mammals for

which the permit is required, and to determine whether the affected population is at its OSP level. Such determinations have been made for several species, but have not been made for many of the mammals that are likely to be taken during fishing operations. For example, no OSP determinations have been completed for harbor porpoises or harbor seals, both of which are incidentally taken in the gillnet fisheries in Alaska and California.

Excluding the tuna fishery, general permits and small-take exceptions were issued to U.S. fishermen in 1983, for a period of five years. These domestic marine mammal permits expire at the end of the current calendar year. Two organizations, in addition to the tuna industry, currently hold general permits for most fishing activities occurring in the Pacific Ocean. The North Pacific Fishing Vessel Owners Association holds four general permits for fisheries in the North Pacific and Bering Sea. The Pacific Coast Federation of Fishermen's Associations holds similar permits for fisheries operating off the coasts of California, Washington, and Oregon. In addition, small-take exceptions have been issued for two East Coast fisheries: the groundfish gillneet [sic] fleet in the Northeast; and the Gulf of Mexico and Atlantic menhaden purse seine fleet.

As the expiration date of marine mammal permits for the domestic fleet approaches, legal proceedings have brought NOAA's authority to reissue those permits into question. In July 1986, the Federation of Japan Salmon Fisheries Cooperative Association (Federation) applied for a five-year general permit to allow the annual incidental take of 5,500 Dall's porpoise, 450 northern fur seals, and 25 sea lions in the course of its Bering Sea salmon driftnet fishery. Following a year of administrative proceedings, NOAA issued a permit allowing the Federation to take 6,039 Dall's porpoise over a three-year period. Authority to incidentally take northern fur seals and sea lions was denied, however, because inadequate information was available to assess the status of those populations.

After the issuance of the general permit, lawsuits to enjoin the permit were filed by the Kokechik Fishermen's Association and several environmental groups. On June 15, 1987, the U.S. District Court for the District of Columbia ruled that issuance of the permit violated the MMPA. Although it was known that northern fur seals are occasionally taken by the Japanese driftnet fishery, NOAA did not authorize them to be taken under the permit, since they are below the desired OSP level. NOAA believed that it had discretion under the Act to authorize the taking of Dall's porpoise, which were found to be at the OSP level, even though some other species would be taken occasionally. The District Court's decision (*Kokechik Fishermen's Association* v. *Secretary of Commerce*) held that NOAA could not issue the permit to take Dall's porpoise if it were likely that northern fur seals would also be taken, because the act prohibits the issuance of a permit and any taking of a population that is below its OSP level. This decision has been affirmed on appeal.

The effect of the decision denying NOAA's discretion to issue permits for any taking if some of the animals to be taken are not at OSP extends beyond the Japanese fishery that was in dispute. NOAA has stated that this interpretation means that domestic

fisheries will also be jeopardized if they take fur seals or other marine mammals from populations that are either known to be below OSP or are not clearly at OSP levels. It has also stated that it may not be able to renew general permits to U.S. fishermen, and that it may have to enforce the prohibitions of the Act against accidental taking of small numbers of marine mammals from depleted populations or from those for which the status is so uncertain as to preclude a finding of negligible impact under the small-take exception.

Concurrently with the legal proceedings, action has been taken regarding the status of two marine mammal populations that are routinely taken by fishermen in the North Pacific Ocean. On May 18, 1988, NOAA issued a final rulemaking designating the Pribilof Island population of northern fur seals as depleted. A similar rulemaking procedure is underway to designate Steller sea lions as depleted. Potential East Coast fishery conflicts with depleted species are also present. Disease has severely reduced some populations of Atlantic bottlenose dolphins over the past two years, and the North Atlantic coastal stock appears to be well below historic population levels.

As a result of the *Kokechik* litigation and the designation of species as depleted, no new permits for foreign fishing operations have been issued in the last year. In addition, NOAA has indicated that renewal of permits or issuance of new permits to replace those of domestic fishermen which expire at the end of the year will not be possible, under existing provisions of the MMPA. In the absence of Congressional action, this situation could result in the closing of fisheries in the North Pacific and elsewhere.

Last spring, concern regarding the seriousness of this situation led to a series of discussions among representatives from the fishing industry and environmental groups. The result of these discussions was a joint proposal to amend and extend authorization of appropriations for the MMPA for three years. The proposal outlined suggestions for a program to maintain protection for marine mammals while allowing continued commercial fishing operations. The goal of the proposal was to provide for improved collection, reporting, and analysis of information to assess and reduce interactions between marine mammals and fishing gear. Principal elements of the agreement included the following:

(1) *Exemption for fishermen.*—The proposal called for a limited exemption from the permit requirements of the MMPA for domestic fisheries which have a continuing, documented interaction with specified marine mammals and which do not qualify for either a small-take exception or a general permit.

(2) *Assessment of fishery-marine mammal interactions.*—The agreement also called for improvement of information regarding incidental take of marine mammals, including an observer program for specified fisheries, monitoring and reporting requirements, and a centralized non-federal data management system.

(3) *Conservation measures.*—Procedures would be established to implement emergency protection measures for marine mammals and for critical habitat zones. In addition, the proposal called for modifying the population status review process to es-

tablish a timetable and facilitate participation by fishermen, environmentalists, and State resource managers.

SETTING ON PORPOISE IN THE YELLOWFIN TUNA FISHERY

For unknown reasons, yellowfin tuna tend to congregate beneath schools of porpoise in the eastern tropical Pacific Ocean (ETP). Tuna fishermen have long recognized this relationship and use the visible schools of mammals to lead them to the tuna. To catch the tuna, large purse-seine nets are drawn around the schools of tuna and porpoise. During this operation, porpoise can become entangled in the netting and may drown or die from shock or injuries. This practice of "setting on porpoise" was estimated to kill several hundred thousand porpoise a year in the 1960's and early 1970's.

Since enactment of the MMPA in 1972, the number of porpoise deaths in U.S. tuna fishing operations has been significantly reduced. This decrease has been achieved through: (1) a general permit as described earlier; (2) regulations requiring the use of porpoise-saving gear and fishing practices; (3) on-board Federal observers; and (4) numerical quotas setting maximum numbers of porpoises permitted to be killed each year. In 1980, NOAA issued a general permit for the years 1981 through 1984 with an annual quota of 20,500 porpoise for the U.S. tuna purse seine fishery. The purpose of the quota was to ensure that the porpoise stocks would not be harmed while providing a limit which was economically and technologically achievable by the tuna industry.

In 1981, the Congress adopted amendments which stated that the goal of the Act would be satisfied in the case of purse seine fishing for yellowfin tuna by the continued application of the best marine mammal safety techniques and equipment that are economically and technologically practicable. At that time, the Committee anticipated that the "zero goal" of the Act could serve to stimulate such new technology for reducing the incidental mortality rate of porpoise taken by tuna fishermen. To ensure that efforts to discover new technology would be undertaken, provisions were adopted which directed the Secretary to undertake a program of, and provide financial assistance for, research into alternative methods of locating and catching yellowfin tuna without the incidental taking of marine mammals.

In the 1984 reauthorization legislation, the general permit held by the American Tunaboat Association was extended statutorily at the 1980 quota level for an indefinite period, subject to a number of conditions. In considering the permit extension, the Commission recognized that the industry had done a very commendable job of reducing porpoise mortality since the 1970s. Also, in order to protect the coastal spotted and eastern spinner dolphins, quotas of 250 and 2,750, respectively, were incorporated into the law. Departing from past practices, the 1984 amendments to the MMPA required that mortalities of these species be counted as within, not in addition to, the overall annual quota.

During the hearings on reauthorization of the Act in 1984, it also became apparent that NOAA did not have the necessary data to assess the effect of fishing mortality on porpoise populations in the ETP. To obtain this information, the Act was amended to direct

the Secretary to carry out a scientific research program to monitor, for at least five years, population abundance and trends of affected porpoise stocks. The amendments also required appropriate modifications to the incidental take quotas and other conditions of the general permit, if the Secretary determined that authorized take levels were having a significant adverse effect on marine mammal populations.

While the U.S. industry has made dramatic improvements since enactment of the MMPA, unregulated tuna fleets of foreign nations now present a far more serious source of porpoise mortality. In 1987, 70 foreign vessels from eight different nations fished for tuna in the ETP and were estimated to kill over 100,000 porpoise. By contrast, the U.S. fleet had an incidental take of 13,992 porpoise in 1987, the second lowest on record. The figures for the year show that 60 percent of the tuna caught and more than 80 percent of the porpoise killed in the ETP were taken by foreign purse seiners. The foreign fleet is approximately twice the size of the U.S. fleet in the eastern Pacific and has estimated porpoise mortality rates which are about four times as high.

The original Act directed the Secretary of the Treasury to ban the importation of commercial fish or fish products that have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of marine mammals in excess of U.S. standards. The Act required the Secretary to obtain reasonable proof from foreign governments in order to make a finding that foreign commercial fishing techniques were not resulting in kills or injuries in excess of U.S. standards. Currently, the requisite findings are in effect for the Cayman Islands, Costa Rica, Ecuador, Mexico, Panama, Spain, Vanuatu, and Venezuela. Consequently, these are the only countries fishing for yellowfin tuna in the ETP which are allowed to export their catch to the United States.

In 1984, the Committee expressed concern that U.S. vessels had been subject to tuna-porpoise regulations for years while foreign vessels had not. Tougher restrictions were determined to be necessary to ensure that nations seeking to import tuna into the United States required their own fishermen to adhere to standards for porpoise protection comparable to our own. Amendments adopted in 1984 established a two-part test for each nation exporting yellowfin tuna to the United States. First, the foreign nation was required to adopt a program for protecting porpoise tuna fishing operations comparable to the U.S. program. Second, the average rate of porpoise mortality by a foreign fleet had to be comparable to that of the U.S. fleet. On March 18, 1988, NOAA issued an interim final rule providing regulations to govern the importation of tuna taken in association with marine mammals. The interim regulations implement the 1984 legislation. They would allow foreign nations until 1991 to show that the porpoise kill rates of their fishermen are comparable to that of the U.S. fleet.

The Inter-American Tropical Tuna Commission (IATTC) is the principal international organization involved in efforts to monitor and reduce porpoise mortality by the international fleet in the ETP. The IATTC was established by convention in 1949, to study the biology and population dynamics of tunas in the eastern Pacific Ocean. In recent years, the IATTC has developed a marine

mammal program which includes observer placement and training of foreign crews regarding the use of porpoise-saving gear and techniques. Last year, IATTC observers were carried on about 30 percent of foreign tuna vessels in the ETP.

OTHER EXCEPTIONS TO THE MORATORIUM

Permits may be issued for the taking or importation of marine mammals for public display and for scientific research. In the case of depleted stocks, permits may be issued for scientific research but not for display. The MMPA does not allow the taking or importation of marine mammals for the purpose of enhancing the propagation or survival of a depleted species or population. By contrast, authority to issue permits for captive breeding programs exists in the Endangered Species Act. Zoo and aquarium professionals have suggested that the MMPA authority to issue permits for scientific research be expanded to include such enhancement activities. In addition, they have requested that import restrictions be relaxed to allow importation of mammals from depleted populations for medical treatment, and of young or nursing animals for their protection or welfare.

Recognizing the importance of subsistence hunting and use of marine mammals to the continued physical health and economic well-being of natives who live in coastal villages, the Act exempts Alaskan natives dwelling on the coasts of the Arctic and North Pacific Oceans. Consequently, so long as takings are not wasteful, section 101(b) of the Act authorizes Alaska natives to take marine mammals for two purposes: for subsistence; and to obtain by-products for the purpose of creating and selling authentic articles of native handicrafts and clothing. Nonwasteful native hunting of non-depleted marine mammals in Alaska conducted pursuant to section 101(b) may not be limited, but the Secretary may regulate the taking of a species or stock that is depleted. In addition, recent regulations (50 CFR 18.23(f)) require marking and tagging of polar bears, walruses, and sea otters, as well as reporting to the FWS of the number of animals taken.

During its recent hearings, the Committee received testimony from the Alaska Federation of Natives, the Eskimo Walrus Commission, and several other native organizations that, in the 16 years the native exemption has controlled native hunting, marine mammal populations that are the subject of the directed native hunt (and are not subject to takings by commercial fishermen) have increased. Testimony also indicated that, through organizations such as the Eskimo Walrus Commission and the North Slope Borough, Alaskan natives are actively involved in self-regulation through their participation in cooperative management agreements. Finally, the organizations expressed their view that the Act should be amended to enable Alaskan natives to sell walrus meat in local commerce and to use by-products to manufacture contemporary handicrafts.

The Committee also has received testimony from the Sierra Club and other environmental organizations which are concerned that native hunting of a species or stock cannot be regulated until a species or stock is depleted . The organizations expressed their view

that the Act should be amended to authorize the FWS, the National Marine Fisheries Service, or another appropriate authority to regulate the native take of nondepleted species.

Based on this testimony, the Committee makes two observations. As to the first one, during the 1981 reauthorization legislation, the Act was amended to establish a procedure to enable the Federal government to transfer regulatory authority over the taking of marine mammals to the State of Alaska. The amendment established standards governing the exercise of that authority which include a subsistence hunting priority and a directive that the State regulate nonsubsistence hunting in a manner that to the "maximum extent practicable" provides economic opportunities for residents of rural coastal villages. To date, the State has not applied for and does not intend to apply for that regulatory authority. However, the State has indicated that, on a species-by-species basis, a cooperative effort would be initiated to develop management plans to assist in the implementation of Federal management responsibilities. The Committee supports cooperative efforts of this nature, and encourages Federal management agencies, environmental organizations, the Eskimo Walrus Commission, the North Slope Borough, and other interested organizations to work with the State to pursue such an approach.

Second, with respect to the various proposals for amendments to the Act, the Committee urges representatives of the native and environmental organizations that presented testimony and other interested parties to develop a joint recommendation as to whether, and if so how, the Act should be amended. The Committee is aware that this will not be an easy task. For that reason, the parties are urged to begin discussions to develop a joint recommendation in an expeditious manner.

FISHERMEN'S PROTECTIVE ACT OF 1967

The Pelly Amendment of the Fishermen's Protective Act provides the President with discretionary authority to embargo fish products from nations whose citizens are certified by the Secretary to be conducting fishing operations that diminish the effectiveness of an international fishery conservation program. The President has discretion to embargo all, some, or none of the fish products from a certified nation, and any such embargo must be consistent with the General Agreement on Tariffs and Trade.

Enacted in 1971, the Pelly Amendment was designed to provide for sanctions against Denmark, Norway, and the Federal Republic of Germany, all of which had refused to refrain from high seas salmon fishing in compliance with a ban on such fishing by the International Commission for the Northwest Altantic [sic] Fisheries. After being advised of the potential applicability of the Pelly Amendment, all three nations agreed to a phase-out of their fisheries.

Subsequently, the Pelly Amendment has been utilized to maintain the effectiveness of the whale conservation program of the International Whaling Commission (IWC). Japan and the U.S.S.R. were certified in 1974 for killing minke whales in violation of IWC quotas. The President did not impose an embargo because both na-

tions agreed to adhere to IWC quotas in the future. Chile, Peru, and the Republic of Korea were certified in 1978 for whaling in violation of IWC quotas. No embargo was imposed because all three nations pledged to join the IWC and abide by its quotas. The U.S.S.R. was certified again in 1985 for killing minke whales in excess of IWC quotas. No embargo was imposed, but its allocations for fishing in the U.S. 200-mile zone were ended until it announced that it would not conduct further whaling activities. Norway was certified in 1986 for killing minke whales in violation of the IWC moratorium. The President did not impose an embargo because Norway announced that it would not resume commercial whaling. Finally, Japan was certified in February 1988 for killing whales in violation of an IWC resolution calling upon it to refrain from such whaling. No embargo was imposed, but its allocations for fishing in the U.S. zone have been reduced.

Thus the history of the Pelly Amendment is one of mixed results. In the early years, the threat of an embargo on fish products seems to have persuaded offending nations to cease violations of international conservation programs and to have persuaded others to refrain from violations they would have otherwise committed. It has been suggested, however, that the significance of the Pelly Amendment has declined as the U.S. exports more fish products than it imports from some nations, and foreign nations have been excluded from the U.S. zone, thereby eliminating the associated threat that they would be denied allocations as a result of certification. Some nations appear to have concluded that the threat of an embargo is an empty one, and violations of the IWC's conservation program have become more, rather than less frequent. An amendment to the Pelly Amendment is needed to increase deterrence.

FUR SEAL ACT OF 1966

The Fur Seal Act of 1966, together with the MMPA, provides authority to the Federal Government to manage and harvest northern fur seals on the Pribilof Islands. The Federal Government has employed Aleut natives on the Pribilof Islands of St. Paul and St. George to carry out this harvest since 1910. Involvement of the Federal Government in sealing activities has raised objections over the years, however, and in 1983, the Fur Seal Act was amended to phase out Federal employment of the Aleuts for that purpose. To compensate the Aleuts for the loss of their primary source of income, the Fur Seal Act established a $20 million trust fund for the Pribilof Islanders to "promote the development of a stable, self-sufficient, enduring, and diversified economy not dependent on sealing".

Consistent with this purpose, both St. George and St. Paul have undertaken construction of harbor facilities to allow them to supply services and shelter to the growing U.S. fishing fleet in the Bering Sea. A particularly severe set of winter storms has delayed completion of the harbors by two years, and both communities need additional funds to allow them to operate essential services in the interim while work on the port facilities is completed.

LEGISLATIVE HISTORY

Over the past year, the full Committee and the National Ocean Policy Study have held two hearings on the reauthorization of the MMPA. The first hearing was held on April 13, 1988, for the purpose of evaluating Federal marine mammal programs, identifying reauthorization issues, and discussing in detail the incidental taking of porpoise by tuna fishermen in the ETP. Witnesses included representatives of NOAA, FWS, the Marine Mammal Commission, the Interamerican [sic] Tropical Tuna Commission, the Environmental Defense Fund, Earth Island Institute, Greenpeace, the United States Tuna Foundation, and the American Tunaboat Association. Tuna-porpoise issues covered in the hearing included the comparability standards required by the 1984 amendments, observer coverage, sundown sets by purse seiners, new or alternative fishing techniques, the status of porpoise populations, skipper performance standards, and the phasedown of the U.S. porpoise quota. Most witnesses were in agreement that further steps could and should be taken to reduce mortality by both foreign and domestic tuna fishermen. However, on the issue of legislating a reduction to zero of the U.S. quota of porpoise, concern was expressed that this action could lead to a net increase rather than a decrease in porpoise mortality.

A second hearing was held on May 19, 1988, at which time testimony was received from representatives of the fishing industry, the environmental community, NOAA, and the Marine Mammal Commission. The primary purpose of the second hearing was to examine the joint agreement reached between the environmental and fishing communities. Witnesses explained that concern regarding the Act's inflexibility in prohibiting any take from depleted marine mammal stocks, the District Court decision, and the pending expiration of domestic general permits and small-take exceptions led to a series of meetings between conservationists and industry representatives beginning in late 1987. The joint proposal outlined earlier was presented at the hearing, on behalf of 25 environmental and 17 commercial fishing organizations.

S. 2810 was introduced by Senator Kerry on September 20, 1988, and is cosponsored by Senators Adams, Breaux, Stevens, Hollings, Packwood, Wilson, Kasten, and Inouye. Later that day, the Committee considered S. 2810 in open Executive Session and agreed to two amendments by voice vote. The first was offered by Senator Stevens to provide an authorization of appropriations in FY 1990 for the St. George Trust. The second was offered by Senator Breaux and requires the Secretary to have observers collect information on living marine resources in addition to marine mammals, based on consultation with fishery management councils and State agencies. The Committee then ordered the bill reported favorably, as amended, without objection.

SUMMARY OF MAJOR PROVISIONS

MARINE MAMMAL PROTECTION ACT OF 1972

The legislation includes the following amendments to the MMPA:

1. Authorization of appropriations.—

[Dollar amounts in millions]

	Fiscal year—				
	1989	1990	1991	1992	1993
NOAA base program	$12.25	$12.74	$13.25	$13.78	$14.33
New observer program	2.70	8.00	8.00	8.00	8.00
FWS	3.00	3.12	3.24	3.37	3.50
Commission	1.10	1.14	1.19	1.23	1.28

2. *Interim exemption for commercial fishermen.*—Based on the agreement among commercial fishing and conservation organizations, the bill would establish a system through which commercial fishermen could obtain exemptions authorizing the incidental taking of marine mammals in the course of fishing activities. Under this system, vessel owners would have to meet certain registration and reporting requirements to qualify for an exemption. The requirements themselves would depend on whether the incidental take of marine mammals in the fishery was frequent, occasional, or rare. Implementation of an observer program would be required for those fisheries which frequently kill or seriously injure marine mammals. Other elements of the five-year program would provide for compiling and assessing information collected and mitigating adverse impacts of the fisheries on marine mammal populations. Finally, the Marine Mammal Commission would be required to develop guidelines to be used in determining permissible levels of incidental taking by fishermen.

3. *Status reviews and conservation plans.*—The bill would provide specific timetables and procedures for the Secretary to follow in conducting status reviews and preparing conservation plans for marine mammals.

4. *Reducing porpoise mortality in tuna fisheries.*—With respect to foreign tuna fishing operations, the bill would define and clarify requirements for comparing the porpoise protection programs of the United States and foreign nations. In addition, intermediary nations which buy tuna from other nations for export to the United States would be expected to show that they had complied with any U.S. ban. With respect to the U.S. tuna fishery, the bill would require skipper performance standards, restrict sundown sets and the use of certain explosive devices, and initiate a National Academy of Sciences assessment of alternative methods of locating tuna.

5. *Permits for public display and scientific research.*—The bill would modify the requirements for the issuance of public display permits and scientific research permits and authorize the issuance of permits for enhancing the survival or recovery of a species or stock.

FISHERMEN'S PROTECTIVE ACT OF 1967

The bill would broaden the embargo authority under the Pelly Amendment to include any product from a certified nation.

FUR SEAL ACT OF 1966

Additional appropriations of $3,200,000 in FY 1989 and $1,800,000 in FY 1990 would be authorized for the St. Paul Island Trust, and $3,700,000 in FY 1990 for the St. George Island Trust.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 27, 1988.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 2810, the Marine Mammal Protection Act Amendments of 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 2810.
2. Bill title: Marine Mammal Protection Act Amendments of 1988.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, September 20, 1988.
4. Bill purpose: S. 2810 would amend and reauthorize programs under the Marine Mammal Protection Act (MMPA). Section 2 of the bill would authorize the Secretary of Commerce to grant exemptions to commercial fisheries for the incidental taking of marine mammals; the Secretary would be authorized to charge fees covering the administrative costs of granting these exemptions. Section 2 would also authorize appropriations of $2.7 million for fiscal year 1989, and $8 million for fiscal years 1990, 1991, and 1992 for a fishing vessel observer program.

Other sections of S. 2810 would establish procedures for rulemakings related to the conservation of marine mammals and would require the preparation of several conservation plans and studies. To fund these activities and others under the MMPA, the bill would authorize appropriations to the Department of Commerce, the Department of the Interior, and the Marine Mammal Commission. S. 2810 would also authorize appropriations to the Secretary of Commerce for trust funds established for the Pribilof Islands.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Authorization level	22.3	30.5	25.7	26.4	27.1
Estimated outlays	16.5	27.2	24.3	25.6	26.4

The costs of this bill fall within budget function 300.

Basis of Estimate: This estimate assumes that the full amounts authorized would be appropriated for each fiscal year. The estimated outlays are based on historical spending patterns.

Based on information provided by the National Oceanic and Atmospheric Administration (NOAA), CBO estimates that the exemption process required by Section 2 would cost about $1 million a year. Fees authorized by the bill would cover these costs, and these activities therefore would have no net effect on the federal budget.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: On September 23, 1988, CBO prepared a cost estimate for H.R. 4189, the Marine Mammal Protection Act Amendments, as ordered reported by the House Committee on Merchant and Fisheries. The estimated cost of S. 2810 is greater than that of H.R. 4189, because it includes an authorization for Pribilof Islands trust funds, which was not in the House bill.

9. Estimate prepared by: Michael Sieverts.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER AND TYPE OF PERSONS REGULATED

Regulations to implement section 2 of this bill, which provides interim exemptions for commercial fisheries, would apply to owners, operators, and crew members of U.S. fishing vessels and of foreign vessels with valid fishing permits issued under the Magnuson Fishery Conservation and Management Act. The status review and conservation plan process established under section 3 would only affect individuals who take marine mammal species or stocks covered by these reviews and plans. Regulations issued under section 4 concerning the taking of porpoise in the tuna fishery would apply to: owners, operators, and crew members of U.S. tuna purse seine vessels fishing for yellowfin tuna in the ETP; foreign vessels desiring to market yellowfin tuna from the ETP in the United States; and intermediate nations from which yellowfin tuna is exported to the United States. Regulations issued under section 5 would pertain to individuals and institutions involved in scientific research and public display of marine mammals. Finally, the amendments to the Fishermen's Protective Act contained in section 7 would affect persons involved in the importation of goods from countries certified under the Act.

ECONOMIC IMPACT

The Departments of Commerce and the Interior, and the Marine Mammal Commission, will incur some costs in fulfilling Federal responsibilities required under this legislation. The funding necessary to carry out these responsibilities should be modest and is not expected to have an inflationary impact on the Nation's economy. A portion of these funds will be incurred in the administration of exemptions and may be recovered through the charging of fees to vessel owners. A modest sum of money is also authorized for funding the Pribilof Island Trust Funds.

PRIVACY

This legislation will not have any adverse impact on the personal privacy of the individuals involved.

PAPERWORK

Some additional paperwork will be required from the commercial fishing industry in order to comply with the registration, exemption, and reporting requirements outlined in this legislation. Similar paperwork is already required for some existing fisheries programs and the legislation requires coordination and integration with such programs to reduce unnecessary duplication. Therefore, the resulting increase in paperwork should be minimized.

Section-by-Section Analysis

SECTION 1.—SHORT TITLE

This section provides the short title, the "Marine Mammal Protection Act Amendments of 1988".

SECTION 2.—INTERIM EXEMPTION FOR COMMERCIAL FISHERIES

This section establishes a new section 114 of the MMPA to provide an interim exemption for commercial fisheries other than the yellowfin tuna fishery in the ETP. This new section supersedes, until October 1, 1993, the permit requirements and incidental taking prohibitions of the Act that would otherwise be applicable.

Subsection (a) of new section 114 specifies that the new section 114 will take effect immediately on the date of enactment of this legislation and will remain in effect until October 1, 1993. During that time period, this section, rather than sections 101, 103, and 104 of the MMPA, would govern the incidental taking of marine mammals by commercial fishermen other than tuna fishermen. The Committee intends that the new section 114 be the sole basis for authorizing, regulating, and penalizing incidental taking in the course of commercial fishing operations, and that no new permits or other authorizations shall be granted under section 101(a)(4) or 104 for incidental taking by fishermen during the interim period. The subsection also provides that this interim system would be available only to persons using vessels of the United States and vessels which have valid fishing permits issued under section 204(b) of the Magnuson Fishery Conservation and Management Act.

The Committee is aware of the decision in *Kokechik Fishermen's Association* v. *Secretary of Commerce*, which is pending before the Supreme Court on a petition for *certiorari*. The Committee does not intend that this section affect the result of that litigation, as it applies to the Japanese salmon driftnet fleet. It is the intention of the Committee that the provisions of the new section 114 not be made available to that fleet because the litigation is still pending and because of continuing uncertainties and concerns about the extent to which its operations outside the U.S. EEZ affect marine mammals and other living marine resources.

During the exemption period, the immediate goal of the Act will continue to be the reduction of the incidental kill or serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate. The Committee anticipates that progress toward this goal can be achieved through, among other things, education programs and the development of alternative fishing gear and techniques. The Committee commends and supports the commitment by representatives of commercial fishing organizations to undertake and fund a special research program on gear technology and fishing practices, and to educate and inform fishermen of their rights and responsibilities under the MMPA. The Committee also would encourage the ongoing cooperation and consensus among commercial fishermen and the environmental community to assist in effectively implementing the interim system.

Subsection (b) of new Section 114 identifies the types of fisheries that will be subject to observer and reporting requirements, establishes a vessel registration system, and provides for penalties under the MMPA for failure to comply with registration and reporting requirements. Vessel owners must comply with the registration and reporting requirements set by the Secretary in each category to engage lawfully in a particular fishery. Failure to do so will be a violation subject to the penalties of the Act. This subsection also provides the Secretary with authority to charge fees to cover the administrative costs of operating the exemption and reporting system. The Committee intends that the term "incidental taking", as used in this section, should be considered to mean the entanglement, serious injury, or death of a marine mammal in the course of normal fishing operations.

The Secretary is required to compile three lists of fisheries, based on the frequency of incidental taking of marine mammals by vessels in those fisheries. It is the Committee's intent that these lists be compiled with the maximum amount of public participation given the time periods involved. Further, the Committee recognizes that for the first year that this section is in effect, the Secretary may not have time to conduct adequate research to determine which fisheries should be included in each list. Therefore, the Committee intends that the list compiled under paragraph (1)(A)(i) of this subsection at a minimum include the following fisheries: Bering Sea and Gulf of Alaska groundfish trawl fisheries; Prince William Sound/Copper River salmon set and drift gillnet fisheries; Unimak Pass and False Pass purse seine and salmon drift gillnet fisheries; Columbia River salmon drift gillnet fisheries; and Washington/Oregon thresher shark drift gillnet fishery.

Paragraph (1)(A)(iii) of Subsection (b) covers those fisheries in which the incidental taking of marine mammals is an exceptional event for any individual fishermen. The Committee expects that fisheries such as the shrimp trawl fishery and menhaden purse seine fishery in the Atlantic Ocean and Gulf of Mexico, where hundreds of thousands or millions of individual sets or tows may result in a small total mortality of animals annually, would be included in this category. Other fisheries should be included in the appropriate categories based on available data and after opportunity for public comment.

Exemptions will be granted by the Secretary upon receipt of completed registrations from the vessel owners and, if reporting requirements and other conditions of the exemption are met, will be reissued in subsequent years. These exemptions, except where restricted by other provisions of this section, shall authorize the incidental taking of marine mammals, including those listed as depleted, in the course of commercial fishing operations. However, the taking of California sea otters is not provided for by the interim exemption. In this regard, the Committee intends that the provisions of this section do not supersede, or otherwise affect, any provisions of the Endangered Species Act or section 1 of P.L. 99-625, which established a California sea otter translocation and zonal management program designed to bring about their recovery. Furthermore, no intentional lethal taking of Steller sea lions or any cetacean, or any marine mammal from a depleted stock, is permitted. The intentional lethal taking of other marine mammals is exempted only when such taking is necessary to protect gear, catch, or human life, consistent with the provisions of current regulations, e.g. 50 CFR 216.24(d)(1) (ii) and (iii).

This subsection also makes clear that fishermen have a 240-day grace period available to them in order to allow time for the Secretary to establish the categories mentioned above and put in place the registration and reporting system. The intention of the Committee is that the owner of a vessel eligible for an exemption under this subsection, as well as the master and crew, will not be subject to the penalties for incidentally taking marine mammals (other than California sea otters) during the 240-day period following the passage of this reported bill.

In addition to the grace period, the Committee intends that before January 1, 1990, only a knowing violation of the requirements in paragraph (3)(C) of this subsection will subject a fisherman to a penalty. The Committee would not consider a knowing violation to include failure on the part of a fisherman to obtain an exemption because he was involved in a fishery the start of which occurred before the Secretary could make available appropriate exemption forms and decals or, because of the remote location of the fishery, the fisherman had no way of knowing of the requirements imposed on him or was unable to obtain the appropriate forms. Vessel owners should apply for an exemption to cover each fishery in which they intend to engage.

Paragraph (3)(E) of subsection (b) exempts vessel owners whose vessels are engaged in fisheries identified in paragraph (1)(A)(iii) of this subsection from penalties for incidental taking if such taking is reported. The Committee expects vessel owners in all categories

to make all reasonable efforts to release animals unharmed. In addition, the Committee does not anticipate that fishermen who are engaged in category (iii) fisheries would often find themselves in a situation requiring intentional lethal take to protect their gear, catch, or lives. The occurrence of such lethal takings would strongly suggest that the fishery should be reviewed and assigned to another category.

Finally, paragraph (5)(C) of subsection (b) authorizes the Secretary to charge a fee to cover the administrative costs of granting an exemption. The amount of any fee should not exceed reasonable administrative costs. Revenues recovered under this provision may not be used to offset the cost of an observer program, data management system, research, or any other authorized activity.

Subsection (c) of new section 114 imposes reporting requirements on fishermen holding exemptions issued under subsection (b) and specifies the information that a vessel owner must compile and submit to the Secretary. The Committee intends the process to be simple and time-sensitive, using, for example, existing logbook recording mechanisms. Such reports should include any information on marine mammals released unharmed from fishing gear, marine mammal sightings, and any physical contact and intentional harassment such as use of acoustic pest control devices. The Committee expects the Secretary to regularly compile, analyze, and make all feasible and appropriate use of these reports.

Subsection (d) of new section 114 requires the Secretary to establish a program to enhance and verify the quality of information in reports received from fishermen. The enhancement program should include education regarding the relevant statutes and regulations, possible penalties for non-compliance, and the purposes behind the applicable laws, as well as a clear explanation of the reporting requirements. The Secretary is expected to work with fishery organizations and the Marine Advisory Program to accomplish this goal.

Subsection (e) of new section 114 establishes and authorizes funds for an observer program to conduct onboard data-gathering activities on vessels engaged in those fisheries with a frequent incidental taking of marine mammals. Observers are to be deployed so that no less than 20 percent nor more than 35 percent of the effort in a given fishery is observed during the course of a fishing season. The Secretary is provided with flexibility in establishing levels of observer coverage within that range to ensure a statistically reliable sample of the level of incidental taking in a fishery. However, it is anticipated that the higher coverage levels will be provided in response to identified problems which require additional information. The Committee notes that representatives of the commercial fishing industry from the Pacific Northwest and Alaska and representatives of environmental organizations jointly agreed that the trawl fisheries of the Bering Sea and the Gulf of Alaska that are listed under subsection (b)(1)(A)(i) should be covered by 24 observers during each of the first two years that the observer program is in effect.

In distributing observers among fisheries and among vessels within a fishery, the Secretary is to be guided by specific standards listed in paragraph (2) of subsection (e) to ensure fair and equitable treatment.

Subsection (e)(4) ensures that observers placed on vessels pursuant to this section can be utilized to collect data relevant to the management of marine resources other than marine mammals. At the request of a Regional Fishery Management Council, state agency in the case of a fishery conducted in state waters, or the Secretary of the Interior regarding seabirds, the Secretary must require the observers to collect additional information on target and non-target species, including quantity, type, and physical condition.

Following public notice and opportunity for comment, if the Secretary finds that the requested information will not contribute to the protection of marine mammals, or the overall understanding of the marine ecosystem including fishery resources and seabirds, a request under paragraph (4) of subsection (e) may be declined. This provision ensures that the Secretary retains discretionary authority with respect to fishery management. The Committee finds that it is appropriate in this specific instance to require that the exercise of Secretarial discretion be contingent on the finding described above, because such a requirement is consistent with the goals of this legislation and the MMPA to improve understanding and protection of marine resources.

The Committee recognizes that situations may arise in which deployment of an observer is not possible or practicable. Paragraph (6) of subsection (e) provides conditions under which observer requirements may be waived for a vessel. First, the requirements may be waived in the case of a vessel which delivers fish directly to a floating processor without bringing the fish on board, if reliable information on marine mammal interactions may be obtained from an observer stationed on the processor rather than on the catcher vessel. This is particularly likely for joint ventures in which the foreign processing vessel already has an observer on board under the provisions of other law. However, an observer on board a processor must be able to assess incidental taking of marine mammals in the fishery. If an accurate assessment cannot be made, then observers must be deployed on the harvesting vessel. Nothing in this section should be construed to prevent the Secretary from placing observers on fishing vessels that deliver to a floating processor, should the Secretary desire to do so to enhance the collection of natural resource data.

An exception to the observer placement requirement also is provided if the facilities for quartering an observer are inadequate or unsafe. On many small vessels, most of the available space is used for the gear and catch, and there may be no area of the vessel available in which to quarter or place an observer. Under such circumstances, an alternative observer program may be used. Similarly, the Committee does not intend to require a vessel with limited space to take an observer if such placement would preclude safe operation of the vessel and gear, or require replacement of a crewmember. However, the Secretary may require the owner to make reasonable improvements to allow future placement of observers.

Finally, the Committee recognizes that the Secretary may not be able to employ, or contract for, sufficient personnel to fully staff the observer program, or that funds may not be appropriated to cover the full cost of an observer program. These events are beyond the control of the Secretary. In such circumstances, paragraph (3)

of subsection (e) lists priorities that should be met in allocating the limited resources of the Secretary.

Paragraph (7) of subsection (e) stipulates that vessel owners shall not be subject to a civil action for injuries on board a vessel with two exceptions: an observer may bring a civil action against an owner for the owner's willful misconduct; and the exemption from liability does not apply if the observer is formally engaged by the owner to perform duties on board the vessel of the sort that would normally be performed by a crewmember. The term "engaged" is used in the sense that a formal contract or an exchange of money or other consideration is involved. Thus, an observer who voluntarily provides minimal assistance in the operation of a vessel, such as by handling a line or cooking a meal, will not be considered to be engaged unless he is paid or employed to do so. This paragraph also applies the limitation on liability to owners of tuna vessels required to carry observers under section 104 of the Act.

Finally, the observer program requirements provided in subsection (e) are independent of the requirements for observer coverage mandated by other Federal or State laws or regulations, and are not intended to supersede, or in any way limit, such other requirements. Thus, for example, the requirement for 100 percent observer coverage on foreign fishing vessels under subsection 201(i) of the Magnuson Fishery Conservation and Management Act is not altered by the requirements of this subsection. At the same time, if the Secretary can effectively utilize observers deployed under other authorities to meet the provisions of this subsection, then the Secretary should do so. The Secretary may, with the consent of the vessel owner, place an observer on board vessels in a fishery where observer coverage is not required by this section.

Subsection (f) of new section 114 requires the Secretary to establish an alternative observer program for those fisheries where observer coverage is required but where deployment of observers on board fishing vessels in sufficient numbers to meet the 20 percent minimum requirement cannot be accomplished. An example of a fishery in which the alternative program would be appropriate is the Alaskan salmon gillnet fisheries, which, by law, have boats too small to carry observers. The alternative observer program may include direct observation of fishing operations from other vessels, airplanes, or points on shore. The alternative program may also be used for fisheries where observer coverage is not required but where the use of alternative observation methods would provide the Secretary with valuable marine mammal data.

Subsection (g) of new section 114 provides the Secretary with emergency authority to impose conditions and restrictions on exemptions issued to fishermen if a fishery is having an immediate and significant adverse impact on marine mammal populations, or if more than 1,350 Steller sea lions or 50 northern fur seals will be taken in a year by all fisheries combined. The Secretary's emergency authority should be used only when no alternative is available and the Secretary should consult to the maximum extent practicable with appropriate Regional Fishery Management Councils and State fishery managers before taking such action. Any action taken should minimize interference with existing fishery management programs and should take into account the economics of the fisheries that may be affected and the availability of existing technology to resolve emergency problems. In requiring such considerations, the Committee does not intend to modify the results of the decision in *Committee for Humane Legislation* v. *Richardson*, which established that the primary purpose of the Act is to protect marine mammals, and that economic considerations are not dispositive. Emergency restrictions may include, but are not limited to, restriction on: the number of marine mammals that may be taken; the season or other period of time when marine mammals may be taken; the manner and location in which marine mammals may be taken; and the use of fishing techniques which are found to cause undue fatalities to any species of marine mammals.

In addition, a situation may arise in which a large number of Steller sea lions or northern fur seals are lethally taken by a fishery occurring early in the year, thereby potentially preventing other fisheries which occur later in the year from operating. If such a situation occurs, the Committee anticipates that the Secretary would work with the North Pacific Fishery Management Council, the State of Alaska, and affected fishermen to develop a system of allocating lethal takes among fisheries. Such a system shall not be used to accomplish other fishery management or social or economic objectives, nor shall it relieve the Secretary of the legal obligation to protect marine mammals as required by the Act.

This subsection also gives the Secretary general authority to impose conditions and restrictions on exemptions granted to vessel owners, including operational or gear restrictions of the type outlined under the Secretary's emergency authority. In addition, the Secretary is required to impose such restrictions in cases where a Regional Fishery Management Council or a State has not taken action necessary to mitigate adverse impacts of a fishery on a marine mammal species or stock. The Secretary should consult to the fullest extent practicable with Councils and States on the nature of such conditions or restrictions.

Subsection (h) of new section 114 requires the Secretary to design and implement an information management system capable of analyzing and processing information on incidental taking of marine mammals. In developing such a system, the Committee anticipates that the Secretary will make cost-effective use of available NOAA capabilities, including the environmental data management expertise and facilities of the National Environmental Satellite Data and Information Service, as well as existing regional information management systems.

Subsection (i) of new section 114 grants the Secretary authority to contract for services and recognizes that some States, Federal agencies, and private organizations already have related programs in place. The Secretary is required to make use of these programs where possible and appropriate. Use of existing programs, to the extent practicable, should encourage cooperation among State and Federal resource managers and is expected to minimize the cost of implementing the reported bill. In addition, the Committee recognizes that a program is in place to collect and compile observer data from foreign fishing vessels. If practicable, the Secretary should expand on this program in carrying out the requirements of subsection (e).

Subsection (j) of new Section 114 imposes restrictions on releasing confidential or proprietary business information to the public. If the Secretary enters into a contract or other agreement to collect or analyze data submitted by observers or obtained from reports, the contractor or other entity should be considered a Federal employee who is entitled to receive the data in raw form, and who is bound by the other restrictions on public release of data in this subsection. Further, the Committee understands that requests for data have been submitted to the Secretary under other authorities and those requests have been denied because the Secretary did not wish to provide data in the form requested, even though release of the data would not have violated confidentiality provisions. The data collected under this section should be made available to the public, in the form requested if possible, as long as the identity of any person or business is not disclosed.

Subsection (k) of new Section 114 requires the Secretary to issue appropriate regulations to carry out the purposes of this section. As is generally provided for in the Act, the Committee expects that the Secretary will consult with the Marine Mammal Commission regarding such regulations and the Secretary of the Interior where appropriate.

Subsection (l) of new Section 114 requires development of recommendations, based on scientific information, public participation, and government evaluation, for establishing a long-term system to govern the incidental taking of marine mammals in the course of commercial fishing after October 1, 1993.

By February 1, 1990, the Chairman of the Marine Mammal Commission is required to transmit to the Secretary and make available to the public recommended guidelines for such a system. The purpose of the guidelines is to provide a scientific rationale for determining the number of marine mammals which may be taken in fishing operations, based on the best biological information available. The guidelines must embody sound principles of wildlife management and may only be issued after full consultation with all interested parties, including but not limited to those individuals and groups interested in the conservation of marine mammals and those involved in all segments of the U.S. commercial fishing industry.

No later than February 1, 1991, the Secretary shall publish in the Federal Register for public comment a suggested regime that, if authorized by further action of the Congress, would govern the incidental taking of marine mammals by commercial fishermen. The Committee expects publication to be preceded by extensive consultation with all interested parties, including all segments of the U.S. commercial fishing industry and especially the Secretary of the Interior in regard to those species under the jurisdiction of that Secretary. In determining permissible levels of take, the Secretary should consider the economic and social, as well as the biological impacts, of the proposed regime.

After reviewing public comments and consulting with the Marine Mammal Commission on any scientific aspects of the suggested regime, but in any event not later than January 1, 1992, the Secretary shall submit his recommendations to Congress.

Section (m) of new Section 114 stipulates that the Secretary of Commerce is required to consult with, and give due deference to recommendations by, the Secretary of the Interior before taking action or making determinations on any activities authorized under this section which affect species or population stocks of marine mammals for which the Secretary of the Interior is responsible under the MMPA.

The term "Secretary" under subsection (o)(2) of new section 114 has been defined to mean the Secretary of Commerce for the sake of administering the interim exemption for commercial fisheries. The Committee recognizes, however, that the Secretary of the Interior has responsibility for administering the Act with respect to species such as sea otters. Although responsibility for implementing the interim exemption is vested in the Department of Commerce, the committee is cognizant that the Department of the Interior must have a role in making decisions which will affect species under its jurisdiction. Consultations are particularly important with respect to the issuance of regulations to mitigate adverse impacts, and the development of guidelines to govern incidental take after the exemption period. Should the Secretary of the Interior determine that the incidental taking of marine mammals in a fishery is having an adverse impact on species under its jurisdiction, the Secretary of the Interior is expected to initiate consultation with the Secretary of Commerce and to work with the Secretary of Commerce in determining appropriate measures to reduce such adverse impact. The Committee suggests that a Memorandum of Understanding between the Department of Commerce and the Department of the Interior may be helpful in defining procedures and timetables for implementing this section.

Subsection (n) of new Section 114 clarifies that the owners of fixed fishing gear such as fish weirs or beach seines will be considered vessel owners for the purposes of this section, and thus will be subject to the same requirements and restrictions as any other vessel owner.

Subsection (o) of new section 114 provides definitions for terms used in the section.

Finally, section 2(b) of this legislation amends section 102(a) of the MMPA to make it clear that persons in compliance with new section 114 are not in violation of the prohibition on taking in section 102.

SECTION 3.—STATUS REVIEW

This section adds a new section 115 and provides specific timetables and procedures for the Secretary to follow in conducting status reviews and preparing conservation plans for marine mammals. Subsection (a) of new section 115 directs the Secretary, in determining the status of any marine mammal stock or species, to follow a prescribed series of steps designed to ensure early and adequate public notice, comment, and participation in the status review process.

Subsection (b) of new section 115 directs the Secretary to prepare conservation plans for North Pacific fur seals and Steller sea lions by specific dates and as soon as possible for other depleted species.

The Secretary is encouraged to prepare and to begin implementing such plans before those deadlines to the extent possible. The Secretary is further encouraged to establish priorities for preparing conservation plans for depleted species other than Steller sea lions and North Pacific fur seals and to publish a schedule for the preparation of such plans. Although not specifically required, the Secretary may prepare conservation plans for other species that may benefit from such plans.

The Secretary of the Interior is also charged with preparing conservation plans for depleted species under that department's jurisdiction. Since recovery plans are already in place for the manatee and the California sea otter, the Secretary may wish to consider whether non-depleted species would benefit from the preparation of conservation plans.

Conservation plans will be modelled on recovery plans developed under the Endangered Species Act and will have the purpose of conserving and restoring species or stocks to optimum sustainable population levels. Among other things, conservation plans should include: (1) an assessment of the status of the species or stock and its essential habitat; (2) a description of the nature, magnitude, and causes of any population declines or loss of essential habitat; (3) an assessment of existing and possible threats to the species and its habitat; (4) a discussion of critical information gaps; (5) a description and discussion of research and management that could be undertaken to meet the objectives of the plan; and (6) a schedule for implementing the research and management actions identified in the plan.

SECTION 4.—TAKING OF PORPOISE IN TUNA FISHERY

Section 4 adds a number of provisions to the MMPA for the specific purpose of reducing the mortality of porpoise in the course of fishing for yellowfin tuna in the ETP.

Subsection (a) adds additional requirements to and clarifies what the Secretary must consider when making a finding as to whether a foreign nation is taking measures comparable to those of the United States in reducing the take of porpoise. The Secretary shall not find that a foreign nation is comparable unless it has met the standards set forth in this subsection in addition to the requirements already imposed by section 101(a)(2) of the MMPA and implementing regulations. The harvesting nation's regulatory program must include, by no later than the beginning of the 1990 fishing season, the same prohibitions that are made applicable to U.S. vessels. The delay in effective date until the beginning of the 1990 season is designed to provide the foreign nation with sufficient lead time to implement those new prohibitions of which it has not had previous notice. It is not intended to relieve the foreign government of the need to include in its regulatory program those prohibitions of which it has been given notice through the interim final regulations. The average kill rate of its fleet must be not more than two times the U.S. rate during the same period of time by the end of 1989 and no more than 1.25 times the U.S. rate by the end of 1990, and the percentage of eastern spinners and coastal spotted dolphin must not exceed 15 percent and 2 percent, respectively, of

the total number of marine mammals taken by its vessels in any year. The fishing operations of a foreign nation's vessels must be monitored, to the same extent as U.S. vessels, by an observer program of the IATTC or an equivalent international program unless the Secretary determines that an alternative program will provide sufficiently reliable documentary evidence. Finally, the harvesting nation must comply with all reasonable requests by the Secretary for cooperation in scientific research.

While the Committee is disappointed that the interim final regulations implementing the 1984 comparability amendments to the Act were issued only recently, it expects that these new amendments will be incorporated into the final regulations immediately. Recognizing that the foreign fleets harvest 60 percent of the yellowfin tuna in the ETP but kill 80 percent of the porpoise, the Committee intends these new requirements to reduce the foreign take of marine mammals, similar to those reductions made by the U.S. fleet.

Subsection (a) also directs the Secretary to initiate embargo proceedings against any intermediary nation wishing to export yellowfin tuna to the United States if that nation does not prohibit, within 60 days of the effective date of an embargo by the United States, the importation of yellowfin tuna into its own country from those nations embargoed by the United States. The Committee strongly supports this provision in order to prevent embargoed nations from circumventing U.S. restrictions, thereby weakening the effectiveness of U.S. law. If the United States embargoes yellowfin tuna and tuna products from any nation, the Committee expects that all yellowfin tuna products exported from that nation, including canned tuna containing any yellowfin, whether caught in the ETP or not, will be embargoed. If a third nation does not embargo the same products, they will not have access to the U.S. market for those products.

Finally, subsection (a) requires the Secretary, within six months after any embargo of yellowfin tuna, to certify such fact to the President. This certification will then allow the President to ban any type of fish and fish product from the embargoes nation, under the current provisions of the Pelly Amendment to the Fishermen's Protective Act of 1967, and to ban the importation of any product under the terms of the Pelly Amendment as it is amended by section 8 of the reported bill.

Subsection (b) directs the Secretary, through the Secretary of State, to initiate negotiations with foreign nations, for the purpose of protecting marine mammals. New subsection 108(a)(2)(A) of the MMPA is essentially the same as current section 108(a)(2), while paragraph (B) is a new provision. For those nations whose vessels harvest yellowfin tuna in the ETP, the Secretary is directed to work through the IATTC or a similar international organization, to develop agreements on cooperative research into alternative fishing methods and population studies, limitations on incidental take levels, and the use of the best marine mammal safety techniques and equipment for the purpose of reducing mortality.

Subsection (c) directs the Secretary to include a description of the results of these discussions in the annual report to Congress on the MMPA.

Subsection (d) amends the conditions under which the extension of the general permit issued to the American Tunaboat Association is granted. Specifically, the Secretary is directed, by January 1, 1989, to promulgate regulations to ensure that the backdown procedure during sets on porpoise is completed, and that rolling of the purse seine net to sack-up has begun no later than 30 minutes after sundown, thereby preventing the high porpoise mortality associated with sundown sets. The Committee expects that in implementing this provision, the Secretary may prohibit the net skiff from being deployed at a certain time before sundown in order to ensure that backdown is completed and rolling has begun by 30 minutes after sundown. The Secretary may also require the use of certain gear, such as snap rings, to expedite fishing operations and minimize the impact on porpoise. It is the Committee's intent that the Secretary ensure through such regulations that tuna fishermen have completed those procedures necessary to release porpoise in the net before dark while allowing them to finish taking tuna out of the net thereafter.

The Secretary is authorized to waive or modify the regulations so as to allow sundown sets under two circumstances. First, individual skippers may be authorized to conduct operations that would otherwise be prohibited if they have demonstrated the consistent ability to prevent high mortality during sundown sets, based upon data that have been collected on observed trips. This waiver would be granted on a trip-by-trip basis for so long as that ability continues to be demonstrated. Second, the Secretary may grant such a waiver for the entire fleet in the event that a breakthrough in techniques or equipment renders the prohibitions no longer necessary.

Subsection (d) also authorizes the Secretary to grant a waiver of any terms or conditions of the general permit to a specific certificate holder for the purpose of conducting experimental fishing operations. The Committee intends that these provisions be used to authorize testing and development of new or alternative fishing gear and techniques that will reduce porpoise mortality.

Subsection (d) also requires the Secretary, before the beginning of the 1990 season, to develop and implement a system of performance standards for certificate holders. The purpose of this system is to allow the Secretary to identify certificate holders whose incidental rate of marine mammal mortality is consistently and substantially higher than the average rate of the fleet. By identifying these skippers or vessels, the Secretary will be able to use his or her authority more effectively to require training or improvements in vessel maintenance, or to suspend or revoke certificates.

The Committee is aware of the progress made by fishermen and the efforts of the skippers' panel established under the general permit to minimize porpoise mortalities. However, testimony was received that indicated the continuing and substantial differences in mortality rates among various skippers and vessels. The performance standards are intended to assist the Secretary and the industry to narrow these differences. The terms "consistently and substantially" are used to make clear that the Committee does not intend that a skipper who may have an excellent record but subsequently suffers one disaster set be identified as a poor performer. Rather, by using these terms or standards, the Committee expects

the Secretary to identify those skippers or vessels having a continuing incidental mortality rate that is above the fleet average. Those so identified would be subject to supplemental training and observation. A continued, unacceptable high rate of porpoise mortality would warrant suspension or revocation of the certificate of inclusion unless the certificate holder discharges the burden to show that it is not the result of a lack of diligence and proficiency.

This subsection also bans the use of any explosive devices, other than those classified as Class C Explosive Pest Control Devices, in the course of tuna fishing subject to the general permit. The permissible explosive pest control devices, defined by regulations of the Department of Transportation (49 CFR 173.100(ii)), may not contain more than 40 grains of explosive material. Moreover, the Secretary is required to prohibit or restrict the use of those devices defined above by April 1, 1990, unless the Secretary finds that their use does not result in the physical impairment or increased mortality of porpoise.

Subsection (d) also requires 100 percent observer coverage for all certificated yellowfin tuna vessels through 1991. After the 1991 fishing season, the Secretary may require a less extensive observer program, so long as it will provide sufficiently reliable information for the effective monitoring of porpoise mortality, as well as compliance with the provisions of the Act and implementing regulations.

Finally, this subsection requires the Secretary, in addition to his present responsibility to consult with the Marine Mammal Commission, to convene annual meetings with representatives from the conservation and scientific communities, as well as the tuna industry, to review the results of efforts to reduce porpoise mortality and develop plans for further efforts relating to the domestic and foreign fleets. Before April 1, 1992, the Secretary is required to submit to the Senate Committee on Commerce, Science, and Transportation and the House Merchant Marine and Fisheries Committee a comprehensive report on the results of the research programs, performance standards, observer programs, prohibition on night fishing, development of alternative fishing techniques, and other efforts. The Committee fully expects these efforts to result in a reduction of porpoise mortality throughout the international fleet. The report also is to include any recommendations the Secretary considers necessary and desirable to reduce further the porpoise mortality throughout that international fleet.

Subsection (e) directs the Secretary to request the National Academy of Sciences, through the issuance of a contract, to identify promising alternative tuna fishing techniques designed to reduce or eliminate the incidental mortality of porpoise and, within one year, submit a research, development, and implementation plan on alternative fishing techniques to the Congress. The Committee remains convinced that the ultimate solution to the tuna-porpoise issue depends upon the development and implementation of such techniques, and expects the Secretary and the Marine Mammal Commission to devote more vigorous efforts to the identification and development of such techniques.

SECTION 5.—SCIENTIFIC DISPLAY AND PUBLIC RESEARCH PERMITS

Subsection (a) amends section 109(h) of the MMPA to allow the importation of marine mammals into the United States for the purpose of providing medical treatment not otherwise available to them in the country of export. It also requires that marine mammals imported under such circumstances be returned to their natural habitat in those cases in which it is feasible. In determining whether it is feasible to return an animal to the wild, the Secretary shall consult with the attending veterinarian and curatorial staff of the institutions providing the medical treatment, as well as such other experts as the Secretary considers appropriate. The Secretary shall also consider the likelihood of whether the animal will successfully readapt to life in the wild and the possibility that the animal may transmit a contagious disease to animals in the wild.

Subsection (b) amends section 102(b) of the MMPA by creating an exception to the prohibition against the importation of marine mammals that were pregnant, nursing, or less than eight months old at the time of taking, if the importation is necessary for the protection or welfare of the animal. The purpose of the subsection is to permit the importation of young animals that have been orphaned or wounded, or are sick, and could not survive in the wild.

The Act currently prohibits the importation of such animals, even if the alternative is the death of the animal, and despite the fact that in some instances, an adult animal of the same species could be imported for public display. This dilemma has recently arisen in the case of orphaned polar bear cubs from Canada. Canadian officials have found it necessary to remove nuisance adult polar bears that represent a threat to public safety. In some instances, the lethal removal of a female bear results in a cub being orphaned, and Canada does not have adequate facilities for the permanent care of captured bears and cubs. This amendment would allow importation of these marine mammals if all other conditions for a public display permit are met. A permit could not be issued, for example, if the program for taking marine mammals in the country of origin were not consistent with the provisions and policies of the Act. Furthermore, all importations of marine mammals, including those pursuant to this section, are subject to the requirements of the Lacey Act and other applicable law regarding humane and healthful transport of wild mammals and birds.

Subsection (c) amends section 101(a) of the Act to include an authorization for the issuance of permits to take and import marine mammals for purposes of enhancing the survival or recovery of a species or stock.

Subsection (d), in general, amends section 104(c) by modifying the requirements for the issuance of public display and scientific research permits, and by establishing requirements for the issuance of permits for enhancing the survival or recovery of a species or stock.

New paragraph (2) of section 104(c) provides that to be eligible for a public display permit, an applicant must offer a program for education or conservation purposes as a component of its overall program. It is clear, however, that the education or conservation program need not be the sole or primary purpose or program of a

qualifying applicant. In addition, this paragraph requires that the Secretary determine, based on professionally recognized standards of the public display community, that the program is acceptable.

Effective public display of marine mammals provides an opportunity to inform the public about the great aesthetic, recreational, and economic significance of marine mammals and their role in the marine ecosystem. It is important, therefore, that public display facilities educate the public about the life history, behavior, unusual sensory capabilities, and other aspects of marine mammals through literature, films, or other techniques in conjunction with display. The Committee recognizes the diversity of public display facilities and the methods available to them for public education. The Secretary should recognize and foster this diversity. This section is not intended to deny the Secretary flexibility or to require the Secretary to regulate the specific content of or methods used in education or conservation programs.

Public display programs should be based on professionally recognized standards of the public display community, such as those of the American Association of Zoological Parks and Aquariums (AAZPA). AAZPA accredited facilities are permanent institutions which own and maintain captive wild animals that represent more than a token collection, are under the direction of a professional staff, provide their collections with appropriate care, and exhibit them in an aesthetic manner to the public on a regularly scheduled basis for the purposes of education, conservation, scientific studies, and recreation. Programs that approximate those of the AAZPA, or which the Secretary otherwise finds acceptable, will meet the requirements of this section. The Committee anticipates that programs based on the standards of other public display professional organizations will be acceptable to the Secretary as well. The Secretary's determination should be guided by the fact that it is not the intent of this legislation to prohibit the display of marine mammals in zoos, aquaria, or amusement parks that comply with applicable regulations and standards. The Committee recognizes that the recreational experience is an important component of public display and that public display has served a useful educational purpose, exposing tens of millions of people to marine mammals and thereby contributing to the awareness and commitment of the general public to protection of marine mammals and their environment.

In addition, an applicant's facilities must be open to the public on a regularly scheduled basis. This is intended to mean regular and predictable hours so that access is reasonably convenient to the public. A seasonal facility open to the public on a regularly scheduled basis during its open season will meet this requirement.

Finally, new paragraph (3) of section 104(c) of the MMPA provides that permits for scientific research may be issued only to an applicant conducting research to further a bona fide scientific purpose that does not involve unnecessary duplication. The National Marine Fisheries Service regulations already use the term "bona fide" as one of the criteria to be considered before issuing a scientific research permit (50 CFR 216.31(a)). The addition of this language is not intended to substantively change the criteria for granting scientific permits, and is merely codifying the regulations.

The Committee expects the Secretary of the Interior to use a similar standard in implementing this section.

Research permits may not be issued for unnecessary duplication of research. This is to ensure that permits are not issued for numerous, duplicative requests for takings of marine mammals if the research is not expected to enhance the body of scientific knowledge. Unnecessary duplication is not synonymous with replication. The repetition of an experiment or procedure to confirm or test the results of the research is recognized as fundamental and crucial to science. Section 205 of the MMPA already directs the Marine Mammal Commission to take every feasible step to avoid duplication of research. This subsection clarifies the application of this standard to scientific research permits.

In the case of scientific research that would involve the killing of marine mammals, permits may only be issued if it is determined that the research cannot reasonably be done using alternative, nonlethal techniques. The Committee encourages the development of such techniques. Further, in the case of lethal research involving depleted marine mammals, the research must either fulfill a critically important research need or directly benefit the affected species or population stock.

New paragraph (4) of section 104(c) provides that the Secretary may issue a permit for enhancing the survival or recovery of a species or stock only if the Secretary determines that the taking or importation is likely to contribute significantly to the survival of the species, and is consistent with any applicable conservation or recovery plan. If no recovery or conservation plan exists, the Secretary is required to evaluate the proposal on the basis of the factors that would be addressed in such plan.

The amendment allows for captive maintenance of depleted species if the Secretary first makes a number of determinations. Also, the Secretary may allow the public display of such marine mammals only he or she determines that the display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.

SECTION 6.—AUTHORIZATION OF APPROPRIATIONS

Section 6 authorizes appropriations to the Department of Commerce, the Department of the Interior, and the Marine Mammal Commission to carry out their responsibilities under this Act, other than the Secretary of Commerce's responsibility to provide observer coverage for commercial fishing vessels, through fiscal year 1993, for which appropriations are authorized under new section 114(e) of the MMPA.

SECTION 7.—STUDY ON MORTALITY OF ATLANTIC DOLPHIN

Section 7 requires the Secretary of Commerce to conduct a study regarding the epidemic and high mortality of east coast Atlantic bottlenosed dolphins which occurred in 1987 and 1988. A plan for conducting the study must be submitted to the House and the Senate before January 1, 1989, and the final report on the study must be submitted before January 1, 1990. The Committee notes that the Secretary has already begun preparations for such a study

and does not intend this section to disrupt or unduly modify existing study plans.

SECTION 8.—AMENDMENTS TO FISHERMEN'S PROTECTIVE ACT OF 1967

This section amends section 8(a)(4) of the Fishermen's Protective Act by deleting the word "fish" and inserting the word "any" in its place. In addition, the definition of "fish products" is deleted in section 8(h) because it is no longer needed in light of the deletion of "fish" from section 8(a)(4).

The result of these amendments is to provide the President with a wider range of options from which to choose sanctions that may be warranted against a foreign nation that diminishes the effectiveness of an international fishery conservation program. The President is authorized to embargo any product, rather than only fish products, from a certified nation. The decision by the President as to whether to embargo any product, however, would remain entirely discretionary, and any embargo would still have to be consistent with the General Agreement on Tariffs and Trade.

The Committee expects that the expanded range of discretionary sanctions provided by this section will encourage foreign governments to consult and consider their decisions more carefully before proceeding with actions that diminish the effectiveness of international fishery conservation programs. The goal is not to sanction nations, but to encourage cooperation and compliance with such programs so that sanctions are not necessary.

The need for more effective international efforts to secure the protection of whales, porpoise, and other fishery resources is increasingly evident. The objective of this section is to contribute to the success of those efforts.

SECTION 9.—PRIBILOF ISLAND TRUST FUNDS

Consistent with the desire of Congress to see that the Pribilof Islanders are able to establish an enduring and diversified economy, this section authorizes additional funds for the St. Paul and St. George Trusts for the following purposes: (1) $1,700,000 for St. Paul Trust for FY 1989 to be used to provide essential services for the people of that island, and an additional $1,500,000 which may be appropriated for the purpose of providing collateral to guarantee the purchase of fuel oil, should present efforts to guarantee the purchase through private sources continue to be unsuccessful; (2) $1,800,000 for the St. Paul Trust for FY 1990 to allow continued funding of essential services through June 1990, at which time it is anticipated that revenue from the newly completed harbor will begin to be available; and (3) $3,700,000 to the St. George Trust for FY 1990 to provide essential services and allow completion of the St. George Harbor project. Of this amount, the Committee understands that $1,900,000 is needed for essential services, while the remaining $1,800,000 would be used for the purchase of construction equipment.

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DOLPHIN PROTECTION AND CONSUMER INFORMATION ACT OF 1990

July 10, 1990.—Ordered to be printed

Mr. Jones of North Carolina, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 2926 which on July 19, 1989 was referred jointly to the Committees on Energy and Commerce and Merchant Marine and Fisheries]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 2926) to require tuna products to be labeled respecting the method used to catch the tuna and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Dolphin Protection and Consumer Information Act of 1990".

SEC. 2. FINDINGS.

The Congress finds that—

(1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean and high seas driftnet fishing in other parts of the world;

(2) it is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that these driftnets have on marine mammals, including dolphins;

(3) the largest processors of tuna products for the American market have recently adopted a policy of not purchasing tuna harvested with high seas driftnets or with purse seine nets intentionally deployed to encircle dolphins; and

(4) consumers should have the opportunity to know whether the tuna that they purchase was harvested with methods known to harm dolphins.

39-006

Purpose of the Legislation

The purpose of H.R. 2926 is to protect dolphins by limiting the sale, and requiring the labeling of, tuna products processed or sold in the United States if the products contain tuna harvested on the high seas by large-scale driftnets or by purse seine nets intentionally deployed to encircle dolphins.

Background and Need for Legislation

PURSE SEINE FISHING IN THE EASTERN TROPICAL PACIFIC

The Marine Mammal Protection Act (MMPA) was enacted in 1972 for the purpose of protecting marine mammals, including dolphins, from the adverse effects of human activities. The law states that "it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations shall be reduced to insignificant levels approaching a zero mortality and serious injury rate."

One factor that prompted enactment of the MMPA was the massive mortality of dolphins occurring as a result of purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean (ETP). For reasons that remain unknown to science, schools of large yellowfin tuna frequently swim beneath schools of dolphins in this region. During the purse seine fishing operation, dolphins are surrounded by the seine. Some become entangled in the net and drown. During the early 1970's, a process known as the "backdown procedure" was developed to help dolphins escape over the top of the net, while the tuna remain trapped below.

Although the number of dolphins killed by U.S. tuna fishermen in the ETP dropped from 360,000 in 1972 to about 20,000 in 1980 as a result of the backdown procedure and other improvements in gear design and fishing techniques, it became clear by 1980 that the MMPA's goal of a death and injury rate "approaching zero"

was not likely to be achieved soon in this fishery. In recognition of this, Congress approved an amendment to the MMPA in 1981 providing that the goal of reduced dolphin mortality "shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable."

Since 1981, the U.S. tuna fleet has operated under a permit that allows up to 20,500 dolphins to be killed annually.

Unfortunately, the reduction in dolphin deaths attributable to the U.S. fleet has been partially offset by a significant increase in the number of deaths attributable to foreign fishing vessels operating in the ETP. This figure increased throughout the early and mid-1980's, reaching 112,482 in 1986.

In an effort to further reduce dolphin mortality, Congress enacted new amendments to the MMPA in 1988. The amendments included a ban on the use of certain explosives, a prohibition on sets at sundown when mortality rates have historically been high, and the establishment of a skipper performance system designed to penalize captains whose record of implementing dolphin protection measures is substantially below the fleet average.

Even more important, the 1988 amendments required the Secretary of Commerce (the Secretary) to certify annually whether the tuna fishing vessels of foreign nations operating in the ETP have established and implemented dolphin-protection measures "comparable" to those in the United States. The importation into the United States of yellowfin tuna, or products made from yellowfin tuna, is prohibited from any nation operating in the ETP which is not certified by the Secretary as having a "comparable" record of dolphin protection.

Although the 1988 amendments have not yet been fully implemented, it appears that they have made progress towards their goal of a substantial reduction in dolphin mortality. In 1989, the number of dolphin deaths attributable to the U.S. fleet dropped from 19,712 to 12,643, or 36%, and the National Marine Fisheries Service has estimated that a comparable reduction took place in mortality caused by the foreign fleet.

Despite the progress that has been made under the MMPA, many conservation and animal rights groups have continued to argue that the original purpose of the MMPA as it affects dolphins should be respected, and that the practice of intentionally deploying nets to encircle dolphins should be ended. A major obstacle to such a change has been the difficulty of imposing it upon the fishing fleets of nations other than the United States.

LARGE-SCALE DRIFTNET FISHING

Another major source of fishing-caused dolphin mortality is the use of large-scale driftnets, primarily by the fishing vessels of Japan, the Republic of Korea, and Taiwan. Large-scale driftnet fishing is a method of fishing using a net or a combination of nets intended to be held in a more or less vertical position by floats and weights, whose purpose is to entangle fish by drifting in the water. The nets can measure 30 miles or longer and constitute an exreme-

ly indiscriminate and wasteful fishing method due to the large number of seabirds, marine mammals, and non-target fish species caught in the nets. Large-scale driftnet fishing has expanded dramatically in recent years, and now involves approximately 1,000 vessels operating in the Pacific, Atlantic and Indian Oceans and elsewhere on the high seas.

Although precise data are not yet available, the National Marine Fisheries Service has estimated that "tens of thousands" of marine mammals, primarily dolphins, are killed annually by large-scale driftnet fishing operations in the North Pacific alone.

Because of the harmful effects that large-scale driftnet fishing has on fisheries and marine mammal conservation, efforts have been made in recent years to ban or restrict the practice. In 1987, Congress enacted the Driftnet Impact Monitoring, Assessment and Control Act (16 U.S.C. 1821 et al.) to require the Secretary of State to negotiate international agreements that would place observers on foreign driftnet vessels to gather information about the environmental impact of driftnet fishing. In February, 1990, the House approved legislation (H.R. 2061) to prohibit U.S. vessels from engaging in large-scale driftnet fishing and calling upon the Secretary of State to negotiate a worldwide ban.

Overseas opposition to driftnet fishing was manifested in the Declaration of Tarawa, signed on July 11, 1989 by the heads of state of the South Pacific nations, and by the adoption of the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific at Wellington, Australia, on November 24, 1989. In addition, the United Nations General Assembly approved a Resolution on December 11, 1989 (A/C.2/44/L.81) calling for a cessation of all large-scale pelagic driftnet fishing in the South Pacific no later than July 1, 1991, and for a moratorium on such activities elsewhere on the high seas by June 30, 1992, unless effective conservation and management measures can be taken to avoid unacceptable impacts on other marine resources.

INTRODUCTION OF H.R. 2926

H.R. 2926 was introduced on July 19, 1989 by Rep. Barbara Boxer of California. As introduced, the bill requires that the label of any product made from tuna which has been caught with driftnets or with purse seine nets set on dolphin bear a statement indicating that the tuna was captured with technologies known to kill dolphins (hereafter referred to as "Dolphin-unsafe"). Tuna products otherwise harvested are required to bear a label indicating that the tuna was "Dolphin-safe". The bill applies to both domestic and imported tuna and would be enforced by the Food and Drug Administration, in consultation with the Department of Commerce. Mislabeling is considered a criminal violation, with offenders subject to imprisonment. Any citizen has standing to seek a restraining order against the sale of mislabeled products.

RECENT DEVELOPMENTS

On April 12, 1990, Starkist Seafood Company, an affiliate of H.J. Heinz Company, announced that it would no longer purchase any tuna caught in association with dolphins, that it would continue its

policy of not purchasing any fish caught with driftnets, and that it would begin labeling cans of Starkist tuna sold in the United States with "dolphin safe" symbols bearing the message: "No Harm to Dolphins". Within hours, two other major tuna processing companies, Van Camp Seafood (Chicken of the Sea) and Bumblebee announced that they, too, would refuse to buy tuna caught in association with dolphins and would begin labeling their tuna as "dolphin-safe". Taken together, these three companies supply approximately 84% of the canned tuna sold in the United States.

During the succeeding weeks, several smaller suppliers of U.S. canned tuna, including Mitsubishi Foods, Mitsui Foods, and the Ocean Packing Corporation announced they would no longer purchase tuna considered "dolphin-unsafe".

These voluntary actions transformed dramatically and immediately the two-decades long controversy that had existed over the setting of purse seine nets on dolphin in the ETP. The U.S. tuna fleet, which had been able since 1980 to operate under a special MMPA permit allowing it to kill as many as 20,500 dolphins a year, found itself deprived overnight of its major customers. The incentives contained within the MMPA to encourage foreign fishermen to improve their record of dolphin protection while still fishing on dolphin were weakened. An enormous new premium was placed on the sale of tuna that were harvested in a manner considered "dolphin-safe".

The action by the processors will influence significantly the size and scope of operations of the 28 U.S. tuna boats previously operating in the ETP. The owners of more than a dozen of these boats have sought the right to operate in the "dolphin-safe" western Pacific; several are considering operating in the Atlantic; some will probably choose to remain in the ETP and either not set on dolphin or continue fishing as usual and sell to foreign markets; and some may change flags.

The effect of the "dolphin-safe" purchasing policies on the operators of foreign flag tuna fishing vessels is not yet clear. The incentive for these vessels to comply with MMPA-type dolphin protection procedures may be diminished because any tuna harvested through the setting of purse seine nets on dolphin will be considered "dolphin-safe". On the other hand, the U.S. provides almost 50% of the world's market for canned tuna and western Europe another 25%. If the time should soon come when all or most of that market is off-limits to driftnet or "dolphin-unsafe" tuna from the ETP, some adjustments in foreign fishing practices may be expected.

COMMITTEE ACTION

H.R. 2926 was introduced on July 19, 1989, by Mrs. Boxer, and was referred to the Committee on Merchant Marine and Fisheries and the Committee on Energy and Commerce. Within the Merchant Marine and Fisheries Committee, the bill was referred to the Subcommittee on Fisheries and Wildlife Conservation and the Environment (the Subcommittee) on July 24, 1989.

HEARINGS

The Subcommittee has conducted three hearings on H.R. 2926 and related issues.

On October 4, 1989, the Subcommittee conducted a hearing on H.R. 2926 and a similar bill, H.R. 2948, introduced by Mr. Levine. The hearing also focused on the Administration's progress in implementing the 1988 MMPA amendments relating to the reduction of marine mammal mortality in the purse seine tuna fishery. Testifying were Mrs. Barbara Boxer and Mr. Mel Levine, U.S. Representatives from the State of California; Mr. James Douglas, Acting Assistant Administrator for Fisheries, National Marine Fisheries Service; Mr. Charles Fullerton, Director, Southwest Region, National Marine Fisheries Service; Mr. David Burney, Executive Director, U.S. Tuna Foundation; Mr. August Felando, President, American Tunaboat Association; Mr. Eugene Bricklemeyer, Greenpeace; Mr. Dennis King, ICF, Inc.; and Mr. Vance Hughes, representing a coalition of environmental organizations.

Representative Boxer testified in support of H.R. 2926, arguing that the public would be willing to pay a higher price for tuna products in return for the assurance that the tuna was not harvested using methods harmful to dolphins. She said that American consumers want and deserve the right to decide whether or not they wish to contribute to the death of a particular species.

Representative Levine also testified in support of H.R. 2926 on the grounds that consumers should have the opportunity to know what impact a product has had on the quality of the environment.

Mr. Douglas testified in opposition to H.R. 2926, arguing that it would be very difficult to enforce, that it would undermine the effectiveness of the MMPA and that it would affect adversely the domestic tuna processing industry. He also urged that Congress consider carefully the precedent of requiring labeling legislation that is unrelated to the character, wholesomeness, and nutritional value of the food product involved.

Mr. Felando expressed opposition to H.R. 2926, which he characterized as unfair to the American tuna industry and an unwarranted intervention into the marketplace. He said that the bill would harm the U.S. tuna fleet and thereby increase, rather than decrease, dolphin mortality.

Mr. King told the Subcommittee that H.R. 2926 would provide consumers with information many desire and recommended that "dolphin-safe" tuna be separated from "dolphin-unsafe" tuna on a trip by trip basis.

Mr. Burney testified in opposition to H.R. 2926 and recommended a continuation of the "balanced" approach to marine mammal protection that is required under the MMPA. He also critized "protectionists" for distributing false information about the tuna-dolphin controversy.

Mr. Hughes testified in support of H.R. 2926 and suggested that the bill be amended so that it would apply to a driftnet only if the driftnet were longer than one and one-half miles. He also recommended that all tuna caught using purse seine nets in the ETP be considered "dolphin-unsafe" unless the tuna were caught on a trip

during which purse seine nets were not used to encircle dolphins and this fact is certified by the skipper and verified by an observer.

The testimony of Mr. Fullerton and Mr. Bricklemyer was directed at progress in implementing the 1988 MMPA amendments.

The second Subcommittee hearing on H.R. 2926 was held on April 4, 1990. Like the first, this hearing also focused on the implementation of the 1988 MMPA amendments as they relate to dolphin protection. Those testifying included Dr. William Fox, Assistant Administrator for Fisheries, National Marine Fisheries Service; Mr. David Burney, Executive Director, U.S. Tuna Foundation; Mr. Robert Hoffman, Scientific Program Director, Marine Mammal Commission; Mr. August Felando, President, American Tunaboat Association; Mr. Vance Hughes, representing a coalition of conservation organizations; and Mrs. Barbara Boxer, a U.S. Representative from the state of California.

Dr. Fox, testifying in behalf of the Administration, expressed opposition to H.R. 2926 and a preference, instead, for seeking to reduce dolphin mortality through continued implementation of the MMPA.

Mr. Burney testified against the bill and argued that its passage would lend credibility to a "scurrilous" campaign directed by some groups against the U.S. tuna industry. He cited a number of allegations against the tuna industry which he characterized as false, and said that approval of H.R. 2926 would assist those planning to boycott supermarkets selling "dolphin-unsafe" tuna, thereby helping to put U.S. tuna boats out of business.

Mr. Hughes expressed support for the bill and said that the offices of environmental groups have been flooded with requests from the public about how to distinguish "dolphin-safe" from "dolphin-unsafe" tuna. He said that it is impossible to answer that question without passage of H.R. 2926. Mr. Hughes also made several recommendations for improving the enforceability of the labeling requirements of the bill.

Mr. Felando opposed the bill and argued that an end to purse seine fishing on dolphin would harm efforts to conserve yellowfin tuna because it would force fishermen to catch the younger, smaller tuna that are not found in association with dolphins. He also said that H.R. 2926 reflected an emotional, rather than a rational, response to the tuna-dolphin problem.

Representative Boxer testified in support of the bill, and argued that only a fraction of the tuna caught in the world would be labeled "dolphin-unsafe" under H.R. 2926 and that tuna caught by any foreign vessel operating without an observer in the ETP would be considered "dolphin-unsafe". For these reasons, she argued, the bill would not unfairly harm or discriminate against the U.S. tuna fleet.

Mr. Hoffman's testimony focused on implementation of the MMPA amendments of 1988.

The Subcommittee conducted its third and final hearing on H.R. 2926 on May 3, 1990. The focus of the hearing was the announcement on April 12 by the three largest processors of tuna for the American market that they would no longer purchase "dolphin-unsafe" tuna. Those testifying were Mrs. Barbara Boxer and Mr. Jim Bates, United States Representatives from the State of Califor-

nia; Mr. Keith Hauge, President, StarKist Company; Mr. Jose Munoz, President, Van Camp Seafood Company; Mr. Dan Sullivan, President, Bumblebee Seafood, Inc.; Dr. William Fox, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration; Mr. John Fitzgerald, Counsel, Defenders of Wildlife, representing the Dolphin Coalition; Mr. Manuel Silva, Chairman, Board of Directors, U.S. Tuna Foundation; Ms. Lesley Scheele, International Small Cetacean Coordinator, Greenpeace; and Mr. Robert Virissimo, Chairman, Board of Directors, American Tunaboat Association.

Representative Boxer testified that the decision by the tuna processors will make tuna labeling a reality within months. She argued, however, that without H.R. 2926 there will be widespread consumer confusion and considerable potential for fraud. Mrs. Boxer also discussed the growing support around the world for purchasing tuna only if it is "dolphin-safe".

Representative Bates suggested that a ban be imposed on the importation of "dolphin-unsafe" tuna into the United States in order to provide an incentive for foreign fishermen to switch to "dolphin-safe" fishing methods. He also expressed support for legislation that he had introduced to authorize the Secretary of Commerce to make grants and low interest loans to U.S. tuna fishermen to conduct research into "dolphin-safe" fishing technologies.

Mr. Hauge testified in support of H.R. 2926 in order to ensure uniform compliance by the tuna industry with the labeling guidelines that Starkist and the two other companies had voluntarily adopted.

Mr. Munoz expressed support for H.R. 2926 and recommended several steps, including the institution of a loan program, to help the U.S. tuna fleet.

Mr. Sullivan urged the Subcommittee to approve the bill with an amendment that would delay the effective date until 180 days after the date of enactment.

Dr. Fox commended the three tuna processors for their decision not to purchase "dolphin-unsafe" tuna and said that this would contribute substantially to a reduction in dolphin mortality caused by U.S. tuna fishermen in the ETP. He also re-stated the Administration's view that H.R. 2926 is unnecessary legislation.

Mr. Fitzgerald argued that the enactment of H.R. 2926 is necessary to prevent tuna products from being falsely labeled as "dolphin-safe". He also expressed support for technical and financial assistance to help the U.S. tuna fleet make a transition to "dolphin-safe" fishing practices.

Mr. Silva criticized the Subcommittee for its failure, in recent years, to act in a balanced manner on issues affecting the U.S. distant water tuna fleet. He said further that the decision by the tuna processors to revise their purchasing practices would seriously and unfairly hurt U.S. tuna fishermen. Finally, he praised U.S. tuna fishermen for their past efforts to reduce dolphin mortality and cited the death of a cousin who had been killed by a shark while helping dolphins escape from a purse seine net.

Ms. Scheele testified in support of H.R. 2926, urged that observer coverage for foreign vessels operating in the ETP be increased to

100%, and that funding for research and development be provided to improve "dolphin-safe" fishing techniques.

Mr. Virissimo praised the U.S. tuna fleet for its efforts to reduce dolphin mortality under the MMPA, and said that a lot of the public concern about dolphin deaths was based on false information. He said that the only labeling requirement for tuna products that would make sense would be a label indicating whether or not the tuna had been harvested in a manner consistent with the MMPA.

SUBCOMMITTEE CONSIDERATION

On May 15, 1990, the Subcommittee met to consider H.R. 2926. Mr. Studds and Mrs. Unsoeld offered an amendment in the nature of a substitute, which was to be considered as original text. The substitute added a new section 8 to the bill which would amend the MMPA to require that anyone seeking to export to the United States a fish or fish product harvested by a nation whose fishing vessels engage in high seas driftnet fishing provide certain documentary evidence to the Secretary. The evidence must indicate that the fish or fish product was not harvested by a driftnet in the South Pacific after July 1, 1991 or in other areas of the high seas after July 1, 1992.

The substitute also (1) clarified the definitions, the penalties, and the procedures to be used by the Secretary in enforcing the Act; (2) eliminated the requirement that "dolphin-safe" tuna be labeled accordingly; and (3) added a provision requiring the Secretary of State to seek international agreements to end the practice of harvesting tuna through the intentional deployment of purse seine nets to encircle dolphins.

Mr. Young offered three amendments. The first, in the nature of a substitute for sections 1 through 7, would have prohibited the labeling of any food product as environmentally safe unless the product and its package met the definition of environmentally safe as determined by the Secretaries of the Interior, Commerce, Agriculture, and Health and Human Services and the Administrator of the Environmental Protection Agency. The amendment was defeated by voice vote.

Mr. Young's second amendment would have deleted the provisions in the bill authorizing citizen suits. The amendment was defeated on a division vote, 4–10.

Mr. Young's third amendment would have deleted the provisions of the bill authorizing criminal penalties. The amendment was defeated by voice vote.

Mr. Weldon then offered an amendment in behalf of Mr. Goss, who is not a Member of the Subcommittee. Mr. Weldon's amendment would have amended the MMPA to prohibit the Secretary from issuing a permit under section 104(c)(2) of that Act for the taking of a marine mammal in state waters for purposes of public display if the Governor of that state has notified the Secretary of the state's disapproval of the permit within 30 days of the time notice of application for the permit has been given. The amendment was adopted by a roll call vote of 14 to 8.

The bill, as amended, was favorably reported to the full Committee by voice vote.

FULL COMMITTEE CONSIDERATION

On May 23, 1990, the Committee on Merchant Marine and Fisheries met to consider the bill.

Mr. Studds offered a series of amendments en bloc. Although some of the amendments were purely of a technical or clarifying nature, others were more substantive. The latter category included:

(1) an amendment providing that a civil penalty would be assessed under section 5(a)(2) against someone making a false certification under the Act only if the false statement were knowingly and willfully made. In other words, if a tuna processor relies on a false certification made by a vessel captain with respect to a supply of tuna, the processor would not be subject to the maximum $100,000 penalty for endorsing that certification unless it could be established that he or she knew the captain's certification was false.

(2) an amendment modifying the citizen's suit provision to make it conform more closely to comparable provisions contained in other laws.

(3) an amendment eliminating a provision in the bill that would have required the Secretary of State to negotiate access agreements for U.S. tuna fishermen to waters within the exclusive economic zones of foreign countries. Mr. Studds said he was reluctant to delete this provision, because he believes it is both important and necessary that negotiations for this purpose be undertaken. However, the United States does not currently recognize the right of any nation to assert management authority over tuna outside its territorial waters. Although the House of Representatives has adopted amendments to the Magnuson Fisheries Conservation and Management Act (MFCMA) that would alter the juridical position of the United States on this point, it would be premature, said Mr. Studds, for the Committee to base a provision in this bill on the assumption that the amendment proposed to the MFCMA will be enacted.

(4) an amendment establishing an effective date for the requirements of the bill.

The amendments offered en bloc by Mr. Studds were adopted by voice vote.

Mr. Young offered an amendment to require the Secretary to report within two years to the Committee on Merchant Marine and Fisheries concerning the costs to U.S. consumers and tuna fishermen of implementing the Act. The amendment was adopted by voice vote.

Mr. Young then offered an amendment to place a limitation on the importation of tuna products into the United States pending the successful conclusion of international negotiations to end the practice of harvesting tuna through the use of purse seine nets intentionally deployed to encircle dolphins. During this period, the amendment would prohibit the importation of a tuna product into the United States unless the Secretary certifies that the tuna contained in the product was harvested in a manner that is "dolphin

safe" under section 4(b). Mr. Davis then offered an amendment to the amendment offered by Mr. Young expanding the applicability of the limitation to include any tuna product sold in the United States, whether or not the product is imported. The amendment to the amendment was adopted by voice vote. The amendment, as amended, was adopted on a roll call vote of 26-19.

Mr. Goss then offered an amendment to modify the provision added to the bill during Subcommittee consideration of an amendment offered by Mr. Weldon. Mr. Weldon's amendment allowed state Governors to object to, and essentially veto, an application under the MMPA for a permit to take a marine mammal in the waters of that state for public display purposes. The amendment offered by Mr. Goss would have given the Secretary the ability to overrule a Governor if the permit applicant is unable to obtain a marine mammal elsewhere in U.S. waters.

Mr. Manton then offered an amendment in the nature of a substitute to the amendment offered by Mr. Goss. The substitute deleted the language of the amendment offered by Mr. Goss and also the language of the amendment offered during Subcommittee consideration by Mr. Weldon. The substitute was adopted by voice vote. The amendment, as amended, was also adopted by voice vote.

The Committee then approved by voice vote a motion offered by Mr. Young to report H.R. 2926, as amended, to the House of Representatives.

SECTION-BY-SECTION ANALYSIS

SECTION ONE. SHORT TITLE

This section provides that the Act may be cited as the "Dolphin Protection and Consumer Information Act of 1990".

SECTION TWO. FINDINGS

This section states four findings of the Congress:

First, that dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern tropical Pacific Ocean and high seas driftnet fishing in other parts of the world.

Second, that it is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that driftnets have on marine mammals, including dolphins.

Third, that the largest processors of tuna products for the American market have adopted a policy of not purchasing tuna harvested with high seas driftnets or with purse seine nets intentionally deployed to encircle dolphins.

Fourth, that consumers should have the opportunity to know whether the tuna they purchase was harvested with methods known to harm dolphins.

SECTION THREE. DEFINITIONS

This section defines terms used in the Act.

The terms "driftnet" and "driftnet fishing" have the meanings given those terms in section 4003 of the Driftnet Impact Monitor-

ing, Assessment, and Control Act of 1987 (16 U.S.C. 1822 note). Thus, the term "driftnet" means a gillnet composed of a panel of plastic webbing one and one-half miles or more in length. The term "driftnet fishing" means a fish-harvesting method in which a driftnet is placed in water and allowed to drift with the currents and winds for the purpose of entangling fish in the webbing.

The term "Secretary" means the Secretary of Commerce.

The term "tuna product" means a food item, including pet food, which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days. This exception is not intended to apply to frozen tuna products, including fresh frozen tuna steaks.

The other terms defined in this section are the "eastern tropical Pacific Ocean" and "label".

SECTION FOUR. LABELING REQUIREMENT

This section establishes a labeling requirement that applies to tuna products exported from or offered for sale in the United States and serves as a point of reference for section 10, which prohibits the sale in the United States of any tuna product unless the Secretary certifies that the tuna in that product is "dolphin-safe" under section 4(b).

Under subsection (a)(1), the labels of certain tuna products are required to include the statement: "THE TUNA IN THIS PRODUCT WAS CAUGHT WITH METHODS THAT KILL DOLPHINS." The products to which this requirement applies are those that are exported from or offered for sale in the United States and which contain tuna (1) harvested on the high seas by a vessel engaged in driftnet fishing; or (2) harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets if the tuna is not considered "dolphin-safe" under subsection (b). As a practical matter, the prohibition in section 10 on the sale in the United States of any tuna product that is not "dolphin-safe" will limit the applicability of this provision to tuna products exported from the United States.

Subsection (a)(2) describes the specific size and location of the statement required on the label of a tuna product to which this section applies.

Subsection (b) describes a category of tuna that is harvested in the eastern tropical Pacific Ocean by a vessel using a purse seine net that is nonetheless considered "dolphin-safe" and therefore not subject to the labeling requirement in subsection (a). Under the subsection, tuna is considered "dolphin-safe" under two circumstances. First, if it is harvested by a vessel that is of a type and size that the Secretary finds is not capable of deploying its nets on or to encircle dolphin. Second, if the product is accompanied by a written statement executed by the captain of the vessel certifying that no tuna was caught on that trip using a purse seine net intentionally deployed on or to encircle dolphin. In this event, the product must also be accompanied by a statement executed by the Secretary or the Secretary's designee, or by a representative of the Inter-American Tropical Tuna Commission, confirming the statement of the captain and saying, further, that there was an approved observer on board the vessel during the entire trip. The two

statements must be endorsed in writing by each exporter, importer or processor of the product.

The Committee expects that the designee of the Secretary and the representative of the Inter-American Tropical Tuna Commission will be the approved observer that was onboard the vessel during the trip.

The requirement that an observer be onboard the vessel during the entire trip is intended to make certain that no tuna will be considered "dolphin-safe" if purse seine nets were intentionally deployed to encircle dolphins at any time during the trip. The Committee notes that, although U.S. flag vessels operating in the ETP already have 100% observer coverage, the average rate of coverage for foreign vessels is only about 40%. Any tuna caught by a foreign vessel that is capable of using its nets to encircle dolphin and that is operating in the ETP without an observer will be considered "dolphin-unsafe".

SECTION FIVE. PENALTIES

This section establishes civil and criminal penalties for violations of the Act.

Subsection (a)(1) establishes a general civil penalty of not to exceed $10,000 for any person who violates a provision of the Act, or a regulation issued under the Act.

Subsection (a)(2) establishes a civil penalty of not to exceed $100,000 for any vessel captain, exporter, importer, or processor who knowingly and willfully makes a false certification under section 4. Under this subsection, a vessel captain would be liable for the penalty if he or she executes a false statement concerning whether or not a vessel using purse seine nets in the eastern tropical Pacific Ocean intentionally deployed its nets on or to encircle dolphin at any point during the trip in question. An exporter, importer, or processor would be liable if he or she knowingly endorses a counterfeit statement or a false statement made by the captain of the vessel or by the Secretary of Commerce or the Secretary's designee (or a representative of the IATTC) confirming the captain's statement and affirming the presence of an observer onboard the vessel during the entire trip.

Subsection (b) establishes criminal and civil penalties for any person who knowingly and willfully produces a tuna product that does not include on its label a statement required for that product under section 4(a). Such a person would be liable for a civil penalty of not more than the greater of $20,000 or twice the fair market value of the tuna product, whichever is greater; and may be imprisoned for not more than 1 year, or fined under title 18 of the United States Code, or both.

SECTION SIX. REGULATIONS

This section requires the Secretary, in consultation with the Secretary of the Treasury and the Commissioner of the Food and Drug Administration, to issue regulations not later than six months after the date of enactment to implement this Act.

The regulations required by this section shall include, but not be limited to, those necessary to:

(1) clarify which food items meet the definition of "tuna product" used in the Act;

(2) specify the format of the statements to be executed under section 4(b)(2); and

(3) provide a means of determining which vessels operating in the ETP, if any, are of a type and size that are capable of deploying their nets on or to encircle dolphins. The Committee expects that the Secretary will make this determination based on vessel size and equipment, and that vessels with more than one speedboat or with a helicopter onboard, for example, would be considered capable of fishing "on-dolphin."

SECTION SEVEN. ENFORCEMENT

Subsection (a) provides that any person may commence a civil suit on his or her own behalf against a person who is alleged to be in violation of this Act, or to compel the Secretary to perform any duty required by the Act which is not discretionary with the Secretary. No action may commence under this subsection unless the plaintiff has given 60 days prior notice of the violation to the Secretary and to the alleged violator; if the Attorney General has commenced a civil action to require compliance with the statutory or regulatory violation at issue; or if the United States has commenced a criminal action for that purpose.

Subsection (b) provides that the district courts of the United States shall have jurisdiction over any action arising under this Act, and that a suit under the Act may be brought in the judicial district in which the violation occurs.

Subsection (c) provides that the Attorney General may intervene as a matter of right in any suit under this section in which the United States is not a party, if requested to do so by the Secretary.

Subsection (d) provides that the court has the discretion to award the costs of litigation to a prevailing party in any final order in a suit under this section.

Subsection (e) clarifies that the injunctive relief provided by this section shall not restrict any other rights that a person, or class of persons, may have under other law to seek enforcement of a requirement of this Act, or to seek any other relief.

SECTION EIGHT. TREATMENT OF FISH CAUGHT WITH DRIFTNETS

This section amends section 101(a)(2) of the MMPA (16 U.S.C. 1371(a)(2) to require that the government of a nation exporting a fish or fish product to the United States provide documentary evidence that the fish or fish product was not harvested with a driftnet in the south Pacific Ocean after July 1, 1991, or in any other waters of the high seas after July 1, 1992. This requirement applies only to fish or products made from fish havested by a nation, such as Japan, the Republic of Korea, or Taiwan, whose fishing vessels engage in high seas driftnet fishing. Failure to provide this evidence will trigger the sanction imposed by this section of the MMPA, which bans the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the kill or incidental serious injury of ocean mammals in excess of United States standards.

The dates cited in this section reflect a Resolution adopted on December 11, 1989 by the General Assembly of the United Nations. That Resolution recommends that all members of the international community agree to (1) take immediate action to reduce large-scale pelagic driftnet fishing activities in the south Pacific region leading to the cessation of such activities no later than July 1, 1991 and (2) a moratorium on large-scale driftnet fishing on the high seas generally no later than June 30, 1992, unless effective conservation and management measures can be taken to avoid unacceptable impacts on other marine resources.

SECTION NINE. NEGOTIATIONS

This section requires the Secretary of State to seek immediately, through negotiations and discussions with appropriate foreign governments, to reduce and, as soon as possible, eliminate the practice of harvesting tuna through the use of purse seine nets intentionally deployed to encircle dolphins.

SECTION TEN. TUNA PRODUCT SALES LIMITATION

This section provides that, until the negotiations called for in section nine are successfully concluded, no tuna product may be sold in the United States unless the Secretary certifies that the tuna harvested for that product was harvested in a manner that is dolphin safe under section 4(b).

SECTION ELEVEN. REPORT

This section requires the Secretary to report to the Committee on Merchant Marine and Fisheries within two years concerning the cost to consumers and U.S. tuna fishermen of carrying out this Act.

SECTION TWELVE. AUTHORIZATION OF APPROPRIATIONS

This section authorizes $4,000,000 to the Secretary, and $2,000,000 to the Commissioner of the Food and Drug Administration, for each of the five fiscal years beginning in 1991, to carry out their responsibilities under the Act.

SECTION THIRTEEN. EFFECTIVE DATE

This section provides that sections 4, 5, and 10 of the Act shall take effect 6 months after the date of enactment or on such later date, within one year after the date of enactment, as may be specified by the Secretary for good cause in regulations issued under section 6(a). The Committee intends that the Secretary exercise the discretion granted under this section only if necessary to allow those acting in good faith to comply with the purposes of the Act to avoid being subject unfairly or unknowingly to penalties for violating the Act. For example, the processors of tuna products will be expected to rely on certifications provided to them regarding the circumstances under which the tuna in those products was harvested. Thus, it may be necessary to allow some time to elapse between the effective date of the requirement that vessel captains certify that tuna is "dolphin-safe" under section 4(b), and the requirement that no tuna product be offered for sale that is not "dolphin-safe".

ADDITIONAL VIEWS ON H.R. 2926

We strongly support H.R. 2926. We believe that consumers should have an opportunity to choose whether the tuna products they buy are harvested using a fishing method known to injure or kill significant numbers of dolphins.

Large-scale driftnet fishing is responsible for the death of thousands of marine mammals every year. These deaths are inevitable and the use of driftnets makes them utterly predictable. There is nothing incidental or accidental about it. The fish and fish products harvested using this damaging and indiscriminate method of fishing do not belong on American supermarket shelves.

Second, for more than two decades, large numbers of dolphins have been killed in the course of purse seine fishing operations in the eastern tropical Pacific Ocean (ETP). Improved fishing techniques mandated by the Marine Mammal Protection Act (MMPA) have dramatically reduced the number of dolphins killed by U.S. fishermen. The 1988 MMPA amendments continued that progress, while providing strong incentives for foreign fishermen to improve their record, as well. Nevertheless, the fact remains that tens of thousands of dolphins are killed every year in this fishery. And the fact remains that these deaths, like those from driftnet fishing, are predictable and avoidable.

The message in this bill is that the intentional, foreseeable and avoidable entanglement of large numbers of marine mammals is no longer acceptable simply for the purpose of making fishing operations more efficient. That should be true for the United States, and for the world.

Some have argued that because major U.S. tuna processors have decided not to purchase tuna that is "dolphin-unsafe", this bill is no longer needed. We disagree. The bill is necessary to make certain that "dolphin-safe" tuna is, in fact, dolphin-safe.

Without it, our nation could be inundated by foreign-caught, foreign-processed tuna bearing a dolphin-safe label that we have no laws to restrict and no procedures to verify.

Some have argued that this bill is somehow unfair to American fishermen. That is nonsense. The large-scale driftnet fishing operations that would be affected by this bill are entirely foreign. And that part of the U.S. tuna fleet that has historically operated in the ETP is already adjusting to the voluntary actions taken by the processors who supply tuna for the U.S. market. Prices paid to fishermen for "dolphin-safe" tuna are on the rise. As a result, this bill will not affect U.S. fishermen adversely. Instead, it will provide a level playing field for U.S. and foreign fishermen seeking access to the U.S. market.

Although we strongly support the bill, we must add one note of caution. During Committee consideration, an amendment offered by an opponent of the bill was accepted and included in the text as

section 10. The amendment appears to ban the sale of any tuna in the United States unless the Secretary of Commerce affirmatively certifies that the tuna was caught using methods that are "dolphin-safe", according to the criteria used to make that judgment for tuna harvested in the ETP. Thus, every tuna fishing vessel in the world that wants to sell to America could be required to meet the observer and bookkeeping requirements established in the Act to govern the harvesting of tuna in the ETP. Such a requirement is obviously unnecessary, and it would, for all practical purposes, exclude the vast majority of all tuna from the U.S. market, including tens of millions of dollars' worth of "dolphin-safe" tuna caught by U.S. fishermen in the western Pacific and off the Atlantic coast. Given the mischievous nature of the amendment, we opposed it and will work to delete or substantially modify it later in the legislative process.

Aside from the need to modify this one section, H.R. 2926 is a good bill. Its passage will maintain the momentum that has been building in support of worldwide acceptance that tuna should be caught using methods that are dolphin-safe. That momentum is strong in the United States and in western Europe. Together, we make up almost seventy-five percent of the world market for canned tuna and together, we have the ability virtually to end fishing practices that are wantonly destructive of marine mammals around the globe. Passage of this bill will take us an important step in that direction.

GERRY E. STUDDS.
CLAUDINE SCHNEIDER.
JIM SAXTON.

DISSENTING VIEWS TO H.R. 2926 OF REPRESENTATIVE DON YOUNG

H.R. 2926 is a bill crafted with the support of certain elite special interests that directly attacks a group of American citizens whose only crime is to obey the laws enacted by the Congress. It should never have passed out of Committee and it should never pass the House.

The alleged purpose of H.R. 2926 is to inform consumers about the food they eat—in this case, tuna. Proponents allege that certain practices used in the harvesting of tuna are inherently bad because they can result in the accidental death of certain marine mammals. Thus, proponents believe that this information should be emblazoned on every package of tuna sold in a retail establishment, leading in turn to a consumer revolt against fishing practices that these groups disagree with. Unfortunately, the facts don't match the rhetoric.

First, every major tuna canner that sells products in the United States has already announced voluntary plans to only buy tuna which they consider "dolphin safe". Therefore, there is no need for the legislation—its goals have been accomplished.

Second, there is no evidence that consumers will react to labels reflecting fishing practices—even if they are fully "informed" from the environmental special interest point of view about those fishing practices—as long as a price differential exists. In fact, in spite of a massive campaign against tuna conducted by a variety of special interest groups last year, the American consumption of canned tuna *increased* by over 8%; and is still rising! Americans like canned tuna because it is an inexpensive, healthy food product that is easy to prepare, serve, and store. Simply slapping a "dolphin unsafe" label on a can of tuna will not keep the consumers away.

What, then, will be the effects of this bill? We have seen some already. The decision to change buying practices made by canning companies—under intense pressure from special interest groups—has shut down one processing plant in Puerto Rico, throwing 5000 workers out of jobs. It has idled one third of the U.S. tuna fleet. Tuna cannery officials have testified that the price of canned tuna will increase to U.S. consumers. Yet the bill will do nothing to save dolphins which are killed in the tens of thousands by foreign tuna vessels over which the U.S. Congress has no control. Further, if tuna fleets must now concentrate on harvesting smaller tuna, which don't associate with dolphins, there are indications that tuna populations will be adversely affected, since tuna will be caught at a younger age and thus not contribute to sustaining populations. In other words, we may—or may not, depending on foreign reactions—save the dolphins at the expense of the tuna.

Finally, let us consider the precedent we are establishing with Federal requirements on the "environmental safety" of food prod-

ucts. Where do we stop? Farmers engage in practices which destroy wildlife habitat. Should cranberries be labeled as environmentally unsafe? Animal rights activists are protesting the conditions under which poultry and cattle are raised. Should fried chicken be labeled? Food regularly is sold in packages that cannot be recycled or whose manufacture contributes to atmospheric ozone depletion. Should fast food hamburgers come complete with fries, a soft drink, and a big Federal warning label? Once begun, where does it end?

If we are serious about providing the consumer with environmental information, then we should look at all of these things. Let's set a single Federal standard for environmental safety all food products so that food producers can determine how to mark those products if they desire to do so. But let's not single out a particular group of Americans who have risked life and limb to save marine mammals and subject them to arbitrary, mandatory labelling requirements just to placate special interests. We should not pass H.R. 2926.

DON YOUNG.

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102D CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPT. 102-746 Part 1

INTERNATIONAL DOLPHIN CONSERVATION ACT OF 1992

JULY 28, 1992.—Ordered to be printed

Mr. JONES of North Carolina, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 5419]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 5419) to amend the Marine Mammal Protection Act of 1972 to authorize the Secretary of State to enter into international agreements to establish a global moratorium to prohibit harvesting of tuna through the use of purse seine nets deployed on or to encircle dolphins or other marine mammals, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "International Dolphin Conservation Act of 1992".

SEC. 2. GLOBAL MORATORIUM TO PROHIBIT CERTAIN TUNA HARVESTING PRACTICES.

(a) IN GENERAL.—The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) is amended by adding at the end the following:

"TITLE III—GLOBAL MORATORIUM TO PROHIBIT CERTAIN TUNA HARVESTING PRACTICES

"SEC. 301. FINDINGS AND POLICY.

"(a) FINDINGS.—The Congress finds the following:

"(1) The yellowfin tuna fishery of the eastern tropical Pacific Ocean has resulted in the deaths of millions of dolphins.

59-006

Purpose of the Bill

The purpose of H.R. 5419 is to establish an international moratorium on the practice of harvesting tuna through the use of purse seine nets deployed on or to encircle dolphins or other marine mammals.

Background and Need for Legislation

INTRODUCTION

The Marine Mammal Protection Act (MMPA) was enacted in 1972 for the purpose of protecting marine mammals, including dolphins, from the adverse effects of human activities. As originally enacted, the law stated that "marine mammals be taken incidentally in the course of commercial fishing operations", but provided that "it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate."

For reasons not fully understood, schools of large yellowfin tuna associate with schools of dolphins in the eastern tropical Pacific Ocean (ETP). Since the late 1950's, fishermen have used the dolphins to locate tuna, and then deployed large purse seine nets around dolphins to harvest the tuna swimming beneath them. During the process, dolphins can become trapped in the nets and drown. The National Marine Fisheries Service (NMFS) estimates that more than 6,110,000 dolphins have been killed in the course of tuna purse seine operations by the U.S. and foreign fleets in the ETP since 1959 (Federal Register, Vol. 57, No. 117, pg. 27010, June 17, 1992).

The number of dolphins killed in the ETP tuna fishery was one of the driving factors behind the passage of the MMPA in 1972. The requirements of the MMPA and improvements in gear design and dolphin release methods have led to significant reductions in the number of dolphins killed by U.S. tuna fishermen in the ETP (from 360,000 in 1972 to about 20,000 in 1980). However, during the same period it became clear that a level of deaths "approaching zero", as required by the MMPA, was not likely to be achieved by the tuna industry in the near future. Consequently, in 1981 Congress amended the MMPA by specifying that the goal of the Act in approaching zero "shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable."

Since 1981, the U.S. tuna fleet has operated under a general MMPA permit that allows up to 20,500 dolphins to be killed annually. Over time, the regulations which apply to the general permit have been strengthened as required by the 1984 and 1988 amendments to the MMPA. Improvements in dolphin release methods, combined with the fact that all but seven vessels in the U.S. purse seine fleet have relocated, resulted in an actual U.S. dolphin mortality in 1991 of 1004 animals (NMFS Dolphin Mortality Status Reports). During the same period, foreign purse seine fleets in the ETP—primarily those of Mexico and Venezuela—have grown proportionately, and now number more than 50 vessels. In 1991, the combined foreign fleets were responsible for the deaths of almost 25,000 dolphins in the ETP.

The Committee's report on the Dolphin Protection and Consumer Information Act of 1990 (Rept. 101-579) recognized the growing

concerns raised by the level of dolphin kills by the foreign fleets in the ETP, stating: "Despite the progress that has been made under the MMPA, many conservation and animal rights groups have continued to argue that the original purpose of the MMPA as it affects dolphins should be respected, and that the practice of intentionally deploying nets to encircle dolphins should be ended. A major obstacle to such a change has been the difficulty of imposing it upon the fishing fleets of nations other than the United States."

TRADE SANCTIONS

In 1984, the MMPA was amended to require that each nation exporting tuna to the U.S. document that it had adopted a dolphin conservation program equivalent to that of the U.S., and that the average rate of mortality of its purse seine fleet was comparable to that of the U.S. fleet. If these requirements were not met, an embargo on the import of yellowfin tuna and tuna products from that nation would be invoked. In 1988, the MMPA was further amended by providing more specific standards with respect to equivalent foreign conservation programs and comparable mortality rates.

In August 1990, Mexico's yellowfin tuna was embargoed under the comparability provisions. In accordance with the procedures of the General Agreement on Tariffs and Trade (GATT), Mexico then challenged the U.S. embargo, claiming it to be an unfair trade practice. In September 1991, a dispute panel convened by the GATT issued a preliminary report supporting Mexico's challenge. The panel report now awaits action by the full GATT council of 108 member nations.

The 1988 amendments to the MMPA require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of tuna and tuna products from embargoed nations. In *Earth Island Institute* v. *Mosbacher* (785 F. Supp. 826 (1992)) the court ruled on the meaning of the term "intermediary nation" which resulted in a secondary embargo of tuna products from more than 20 intermediary nations. While some of the intermediary nations have since complied with the certification procedure, other nations have considered themselves to be unfairly embargoed since they do not import yellowfin tuna from nations under a primary embargo. As a result, the European Community began a second GATT challenge process in June, 1992.

STATUS OF DOLPHIN STOCKS

The status of the dolphin stocks affected by the ETP tuna fishery has been debated for years. Concern regarding the level of kills of two ETP dolphin species, the coastal spotted dolphin and the eastern spinner dolphin, resulted in a 1984 amendment to the MMPA further limiting kills of these species by the U.S. fleet. At the same time, the Secretary was directed to undertake a five-year research program to monitor trends in dolphin stocks. NMFS has now completed most of the surveys mandated by the five-year research program, and no significant trends in the status of dolphin population have been detected. However, for such trends to be detected over

the five-year survey period, stock sizes would have had to increase or decrease by approximately 40–50 percent (Marine Mammal Commission Annual Report to Congress, 1991).

On August 2, 1991, a coalition of 24 environmental organizations petitioned NMFS to list one of the ETP dolphin stocks, the eastern spinner dolphin, as "depleted" under the MMPA. On August 30, 1991, 21 environmental groups petitioned to list the same species as "threatened" under the Endangered Species Act (ESA).

On October 28, 1991, a coalition of nine environmental groups petitioned NMFS to list another ETP species, the northern offshore spotted dolphin, as depleted. On January 17, 1992, the American Tunaboat Association notified NMFS by letter that it opposed these listings on the basis that NMFS did not have adequate data to make the determinations.

On June 17, 1992, NMFS published a notice in the Federal Register (Vol. 57, No. 117, pg. 27010) proposing to list the eastern spinner dolphin as depleted. NMFS estimates that 1,362,000 eastern spinner dolphins were killed in the ETP tuna fishery from 1959–1990. The current population estimate for this stock is 565,800. NMFS is currently considering whether a threatened listing is appropriate for the eastern spinner.

In a June 18, 1992, Federal Register Notice (Vol. 57, No. 118, pg. 27207) NMFS proposed to list the northern stock of the offshore spotted dolphin as depleted. The current population estimate for this stock is 1,651,600. NMFS is also currently considering whether a threatened listing is appropriate for this stock.

During the 1991 fishing season, the kill by the U.S. fleet, by species and stock, was: 636 northern offshore spotted dolphins; 189 northern whitebelly spinner dolphins (combined population estimate for northern and southern whitebelly spinners=1,020,100); 81 eastern spinner dolphins; 93 central tropical common dolphins (population estimate=415,000); and five dolphins of other species.

Generally, the MMPA does not allow taking of a marine mammal from a stock or species designated as depleted. While the 1988 MMPA amendments allow the incidental take of small numbers of marine mammals from a depleted stock or species during the course of commercial fishing operations, those amendments do not cover ETP yellowfin tuna purse seine operations. Consequently, the effect on the U.S. tuna fleet's general permit of a depleted listing for ETP dolphin stocks is unclear.

DOLPHIN-SAFE POLICY

In April, 1990, StarKist Seafood Company, a division of H.J. Heinz Co., announced that it would no longer purchase any tuna caught in association with dolphins and that it would begin labeling cans of StarKist tuna with "dolphin-safe" symbols. Van Camp Seafood (Chicken of the Sea) and Bumblebee immediately announced that they would adopt the same policy. Together, these three companies supply over 80 percent of the canned tuna sold in the United States, and employ more than 7,000 American workers in their dolphin-safe processing plants in Puerto Rico, American Samoa, and California. In addition, Pan Pacific Fisheries, the last continental U.S. processor and canner to purchase tuna directly

from the U.S. tuna fleet in the ETP, announced it would adopt a dolphin-safe policy. Pan Pacific employs about 300 workers in a processing plant located in San Diego, California.

In response to these voluntary actions, Congress enacted the Dolphin Protection Consumer Information Act (P.L. 101-627) in 1990, establishing criteria for labeling tuna products as "dolphin-safe". To qualify, tuna caught in the ETP (1) must have been caught by a vessel too small to deploy its nets on dolphins; or (2) must be accompanied by a certification from a qualified observer that no dolphin sets were made for the entire trip on which that tuna was caught; or (3) cannot have been harvested using large-scale driftnets.

In November, 1991, Kraft General Foods, the largest U.S. purchaser of canned tuna for the food service market, announced that it would also adopt a dolphin-safe policy.

SOUTH PACIFIC TUNA ACT OF 1988

On June 7, 1988, the President signed the South Pacific Tuna Act (P.L. 100-300), which implemented the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States. The treaty assured access to the south Pacific Ocean tuna fishing grounds for most of the U.S. fleet through 1992. Because dolphins and tuna do not associate in the south Pacific Ocean as they do in the ETP, tuna harvested by purse seine vessels in the south Pacific is considered dolphin-safe.

Under the treaty, the U.S. tuna fleet has contributed $3 million annually to purchase licenses for approximately 40 vessels, to fund an observer program and provide other assistance. The treaty also requires that the United States provide financial assistance to participating island governments through the Foreign Assistance Act of 1961. These funds averaged $10 million annually from 1988-1992.

The Department of State recently concluded a renegotiation of the treaty through the year 2002. The new terms include a commitment from the Department of State to extend its support through the Foreign Assistance Act at an average of $14 million annually for the next ten years. The U.S. tuna fleet has committed to a contribution of $4 million annually for the same period. The successful renegotiation of the treaty means that all existing U.S. tuna purse seine vessels, including those now fishing in the ETP, will have the opportunity to fish in dolphin-safe waters for at least the next decade.

REPORT BY NATIONAL ACADEMY OF SCIENCES

The 1988 MMPA amendments directed the Secretary of Commerce to contract with the National Academy of Sciences for an independent review of alternative tuna fishing methods that do not involve the intentional encirclement of dolphins. This review was to have been completed by September 8, 1989, and the results submitted to Congress by December 5, 1989. However, the Secretary of Commerce did not finalize the contract for the review until September, 1989. Under the terms of the contract, the review was to

have been completed by September 10, 1990, and it was finally released by the National Academy of Sciences on February 25, 1992.

Although Congress had requested a review of fishing methods that did not involve encirclement of dolphins, the Academy's analysis concluded that "no methods of catching tuna without killing dolphins—currently available or capable of rapid development—are as efficient as current methods". Therefore, while it was not specifically in its charge to do so, the Academy chose to focus on modifications of current methods that involve encirclement.

The report contained no new information, but made several recommendations based on existing fishing practices, including: (1) development of an international training program for vessel captains; (2) initiation of an international research program to test alternative fishing methods; and (3) modification of current methods to further reduce dolphin mortality.

ADMINISTRATION PROPOSAL

On March 3, 1992, the Departments of State and Commerce submitted a legislative proposal to the Congress aimed at promoting international dolphin protection and resolving the GATT trade issue. The Administration's proposal imposed a five-year global moratorium on the practice of intentionally encircling dolphins with purse seine nets; lifted the current embargoes on nations that commit to the moratorium; implemented additional provisions to reduce dolphin mortalities prior to the onset of the moratorium; and revoked the existing MMPA permit allowing the U.S. tuna fleet to take 20,500 dolphins annually in the ETP effective with the beginning of the moratorium on March 1, 1994. The Administration's proposal was accompanied by letters of commitment to the moratorium from Venezuela and Mexico.

Response to the Administration's proposal is described in the section of this report on Committee Action—March 18, 1992, Hearing.

IATTC PROPOSAL

On June 18, 1992, the Inter-American Tropical Tuna Commission (IATTC) adopted a multilateral program to reduce dolphin mortalities in the ETP. The membership of the IATTC consists of nations that either fish for, or purchase large quantities of, ETP-tuna: U.S., France, Japan, Venezuela, Panama, Costa Rica, Nicaragua, and Vanuatu. In addition, four non-member nations that fish in the ETP ratified the resolution; Mexico, Colombia, Ecuador, and Spain.

The IATTC resolution contains the following provisions: (1) limit dolphin mortalities in the ETP tuna fishery, beginning with 19,500 mortalities in 1993 and reducing to fewer than 5,000 annual mortalities by 1999; (2) require that these limits be assigned on a per-vessel basis, and that a vessel cease fishing when it reaches its quota of dolphin deaths; (3) establish an international research program on methods of reducing dolphin mortalities; and (4) require observers on all purse seine vessels.

The Administration supports the basic provisions of the IATTC resolution in the event that H.R. 5419 is not enacted into law. The environmental community is opposed to the resolution because it allows 75,000 dolphin mortalities through 1999, and never com-

pletely eliminates mortalities or the practice of intentionally encircling dolphins. The American Tunaboat Association, comprised of boat owners who fish in the ETP and the south Pacific Ocean, supports the resolution.

COMMITTEE ACTION

MARCH 18, 1992, HEARING

On March 18, 1992, the Subcommittee on Fisheries and Wildlife Conservation and the Environment conducted a hearing on the Administration's proposed legislation. The Subcommittee heard testimony from two panels of witnesses. The first panel consisted of: Mr. Curtis Bohlen, Assistant Secretary of State for Oceans, International Environmental, and Scientific Affairs who was accompanied by Mr. David Colson, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs; Ms. Carmen Suro-Bredie, Assistant U.S. Trade Representative for Intellectual Property and the Environment; and Mr. Jay Johnson, Deputy General Counsel for the National Oceanic and Atmospheric Administration.

Secretary Bohlen, speaking for the Administration, explained that the Administration's proposal had been endorsed by the governments of Mexico, Venezuela, and Panama, all of whom agreed that its enactment would save the lives of 20,000 dolphins each year from now into the foreseeable future. He added that the proposal would also be good for U.S. foreign relations, which had been strained by what the other nations saw as a failure by the U.S. to comply with its international trade obligations.

The second panel consisted of: Dr. James Joseph, Director of the Inter-American Tropical Tuna Commission; Mr. Richard Atchison, Executive Director of the American Tunaboat Association; Ms. Traci Romine, Tuna/Dolphin Project Coordinator for Greenpeace International; and Mr. John Fitzgerald from Defenders of Wildlife.

The witnesses on the second panel each disagreed with various aspects of the Administration's proposal. Dr. Joseph recommended that the Administration allow a much longer time period prior to implementing a moratorium. Mr. Atchison expressed concerns about the impact of the proposal on the U.S. fleet. Ms. Romine recommended a more multilateral approach, and Mr. Fitzgerald stated that the proposal in its current form did not contain enough enforcement provisions to ensure international compliance. Both Ms. Romine and Mr. Fitzgerald assured the Subcommittee of their willingness to work with the Administration on a better proposal.

ADDITIONAL COMMITTEE ACTION

H.R. 5419, a bill to establish a global moratorium on the practice of harvesting tuna by intentionally encircling dolphins with purse seine nets, was introduced by Mr. Studds, Mr. Goss, Mrs. Boxer, and Ms. Schroeder on June 17, 1992. The bill was referred to the Committee on Merchant Marine and Fisheries, and the Committee referred the bill to the Subcommittee on Fisheries and Wildlife Conservation and the Environment.

Prior to the introduction of the bill, Subcommittee staff held a series of meetings with the environmental community, representatives of the American Tunaboat Association, StarKist Seafood Company, representatives of the governments of Mexico and Venezuela, and the Administration. On June 1, 1992, Mr. Studds and Mr. Young sponsored a meeting attended by eight national environmental organizations, the American Tunaboat Association, the U.S. Tuna Foundation (consisting of boat owners and canners), StarKist, the Office of the U.S. Trade Representative, the EPA, and the Departments of Commerce and State. The meeting was chaired by a professional mediator, and its purpose was to ascertain ways to improve the Administration's proposal and find common areas on which to base similar legislation.

SUBCOMMITTEE MARKUP

On June 25, 1992, the Subcommittee met to mark up H.R. 5419. Mr. Studds and Mr. Goss offered a series of technical amendments en bloc which were adopted by voice vote.

Mr. Tauzin offered an amendment to extend the bill's sanction provisions to include shrimp and shrimp products. Following a discussion on conflicting information relating to Mexico's commitments to implement sea turtle conservation practices in its shrimping industry, Mr. Tauzin agreed to withdraw the amendment pending resolution of the issue prior to Full Committee markup. There being no further amendments, the Subcommittee adopted the bill by voice vote and ordered H.R. 5419, as amended, reported to the Full Committee.

FULL COMMITTEE MARKUP

The Full Committee met on July 1, 1992, to consider H.R. 5419 as reported by the Subcommittee. Mr. Studds and Mr. Goss offered a series of technical amendments en bloc which were adopted by voice vote.

Mr. Tauzin offered an amendment to extend the bill's sanction provisions to include a ban on imports of shrimp and shrimp products from nations who had committed to the moratorium but had failed to implement those commitments within 90 days after being certified by the Secretary of Commerce. The amendment was adopted by voice vote.

After a discussion regarding the bill's potential impacts on the tuna fishing industry, Mr. Davis moved to send the bill back to the Subcommittee. The motion was defeated by a division vote of 16–8. The Committee then reported the bill favorably to the House of Representatives by a recorded vote of 32 in favor and 12 against.

The vote on H.R. 5419, as amended, was recorded as follows:

Member	Yea	Nay
Walter B. Jones, North Carolina	X	
Gerry E. Studds, Massachusetts	X	
Carroll Hubbard, Jr., Kentucky	X	
William J. Hughes, New Jersey	P	
Earl Hutto, Florida	P	
W.J. (Billy) Tauzin, Louisiana	P	
Thomas M. Foglietta, Pennsylvania	P	
Dennis M. Hertel, Michigan	X	
William O. Lipinski, Illinois	P	

Member	Yea	Nay
Robert A. Borski, Pennsylvania	P	
Thomas R. Carper, Delaware	X	
Robin Tallon, South Carolina	P	
Solomon P. Ortiz, Texas	X	
Charles E. Bennett, Florida		
Thomas J. Manton, New York	P	
Owen B. Pickett, Virginia	X	
George J. Hochbrueckner, New York	X	
Stephen J. Solarz, New York	P	
Frank Pallone, Jr., New Jersey	P	
Greg Laughlin, Texas	P	
Nita M. Lowey, New York	X	
Jolene Unsoeld, Washington	X	
Gene Taylor, Mississippi	X	
Glenn M. Anderson, California		X
Jack Reed, Rhode Island	X	
William J. Jefferson, Louisiana	X	
Eni F.H. Faleomavaega, American Samoa	X	
H. Martin Lancaster, North Carolina	X	
Lucien E. Blackwell, Pennsylvania	X	
Robert W. Davis, Michigan		X
Don Young, Alaska		P
Norman F. Lent, New York		P
Jack Fields, Texas		X
Herbert H. Bateman, Virginia		
Jim Saxton, New Jersey	X	
Helen Delich Bentley, Maryland		P
Howard Coble, North Carolina		P
Curt Weldon, Pennsylvania	P	
Wally Herger, California		X
James M. Inhofe, Oklahoma		P
Porter J. Goss, Florida	X	
Arthur Ravenel, Jr., South Carolina	X	
Sonny Callahan, Alabama		P
Wayne T. Gilchrest, Maryland	X	
John T. Doolittle, California		X
Randy "Duke" Cunningham, California		X
Total	32	12

Note.—Those Members voting by proxy are indicated with a "P." Those Members voting in person are indicated by "X."

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section states that the short title of the bill is the International Dolphin Conservation Act of 1992.

SECTION 2. GLOBAL MORATORIUM TO PROHIBIT CERTAIN TUNA HARVESTING PRACTICES

Section 2 amends the MMPA by creating a new title, Title III, establishing a global moratorium to prohibit certain tuna harvesting practices. New sections 301–308 would be established under the new title.

Section 301. Findings and policy

Subsection 301(a) of the MMPA, as amended by the new title, finds that the yellowish tuna fishery of the ETP has resulted in millions of dolphin deaths and that, as a result, increased concern for dolphin populations has encouraged a global change in fishing

methods. This subsection also credits the U.S. tuna fishing industry with developing methods to reduce dolphin mortalities and the U.S. tuna processing companies with voluntarily establishing a dolphin-safe policy. In addition, the subsection recognizes that other governments have indicated their willingness to reduce and eventually eliminate dolphin mortalities associated with the purse seine fishery in the ETP.

Subsection (b) determines that it is U.S. policy to eliminate marine mammal mortalities resulting from intentional encirclement of dolphins in tuna purse seine fisheries. The Committee used the term "intentional" to distinguish this practice from other fishing methods in which marine mammals may be accidentally killed or injured during the course of normal fishing operations. The Committee recognizes that in other fisheries, including other purse seine fisheries, marine mammals are not specifically targeted for encirclement or net deployment as they are in the yellowfin tuna purse seine fishery in the ETP.

This subsection also establishes that it is U.S. policy to secure international agreements to reduce and eventually eliminate dolphin mortalities in the ETP, to encourage the use of observers on non-U.S. purse seine vessels, and to ensure that the U.S. market does not act as an incentive for the harvest of dolphin-unsafe tuna. Finally, subsection 301(b) determines that it is policy to ensure that U.S. tuna fishing vessels have access to productive tuna fishing grounds outside of the ETP.

Section 302. International agreements to establish a global moratorium to prohibit certain tuna harvesting practices

Subsection 302(a) authorizes the Secretary of State to enter into international agreements which establish a global moratorium of at least five years' duration on the practice of intentionally encircling dolphins with purse seine nets during tuna fishing operations. While the Committee recognizes that the Secretary of State does not require Congressional authority to enter into such international agreements, the Committee intends that this subsection will serve to encourage the Secretary to do so.

Subsection (b) specifies the terms of international agreements entered into pursuant to 301(a). The subsection establishes that the moratorium is to take effect on March 1, 1994. This date was determined during the initial Department of State negotiations with Mexico and Venezuela which resulted in the Administration's proposal of March 3, 1992. Terms of agreement shall also include an international research program, and reviews and reports of the research conducted under that program. This subsection also requires each country that is a party to the agreement to take whatever steps may be necessary to comply with the moratorium, and to encourage other countries to enter into the moratorium.

Subsection (c) establishes a procedure by which the U.S. could withdraw from a five-year moratorium prior to December 31, 1999. Under this procedure, the Secretary of Commerce is required to submit a recommendation to the Congress that the moratorium be terminated. Section 304 establishes the procedures by which such a recommendation could be made. The recommendation must then be approved by a joint resolution initiated in either House of Con-

gress. The Committee does not intend that this procedure should be used for unilateral action on the part of the U.S. to terminate the moratorium without an international agreement to do so, as established in section 304.

Section 303. Research programs

This section requires agreements establishing a moratorium to have an international research component. Section 303 introduces the concept of a "competent regional organization" into H.R. 5419. This term is defined in section 308 of the bill.

Subsection 303(a) states that the research program must have two goals: To develop methods of fishing for large yellowfin tuna (1) without encircling dolphins, and (2) by encircling dolphins without causing mortalities. This subsection also requires that the international research program be conducted under the auspices of a competent regional organization, and that research cruises be conducted by vessels that encircle dolphins solely for research purposes and not for commercial harvest. Research cruises must also have an observer on board.

Paragraph (b)(1) limits the total number of research sets during which dolphins are encircled to 400 annually and the total dolphin mortality during research sets to 1,000 annually. Paragraphs (2) and (3) recognize the role of the IATTC, as the competent regional organization in the ETP, in reviewing research procedures.

In subsection (c), paragraph (1) requires that funding for research be established in a fair and equitable manner. The Committee intends that research funds should be fairly distributed among the nations that participate in, and adhere to the requirements of, an international research program. Paragraph (2) states that, to the extent possible, the proceeds of tuna harvested during research cruises should be used to fund the research program.

Paragraph (3) requires funding provided by the U.S. for research to be used only for developing alternative methods of fishing that do not involve encircling dolphins. This paragraph does not represent a change from existing U.S. policy. Finally, paragraph (4) requires that the Marine Mammal Commission review research proposals to the IATTC and recommend an appropriate response to the U.S. Commissioners to the IATTC.

Section 304. Reviews, reports, and recommendations

Subsection (a) requires the Secretary of Commerce to submit annual reports to the Congress on actions taken pursuant to the bill.

Subsection (b) establishes the requirements that must be fulfilled before the Secretary can recommend to the Congress that the moratorium be lifted. The Committee expects that a Secretarial recommendation to lift the moratorium prior to December 31, 1999, will be based on proof from a competent regional organization or other nation that a method of encircling dolphins without mortalities has been developed, or that dolphin-safe methods of fishing have negatively affected yellowfin tuna stocks to a major degree. The Committee also expects the Secretary to consult with the Marine Mammal Commission prior to making the recommendation.

Section 305. International commitments

Subsection 305(a) provides that the existing embargo provisions of section 101 of the MMPA will not apply to nations that formally commit to (1) implementing a moratorium on encircling dolphins with purse seine nets effective March 1, 1994; (2) requiring observers on all their tuna purse seine vessels larger than 400 short tons carrying capacity; and (3) reducing their dolphin mortalities until the effective date of the moratorium.

Subsection (b) requires the Secretaries of State and Commerce to determine periodically whether countries that have committed to the moratorium are implementing their commitments. The Committee expects that such determinations will occur at intervals of no less than six months. This subsection also establishes a series of import bans on nations that fail to comply with their commitments under an international agreement.

Paragraph (1) requires that, 15 days after a nation has been certified for failing to implement all the commitments described in subsection 305(a), its yellowfin tuna and yellowfin tuna products will be banned from entry into the U.S.

Paragraph (2) extends the ban to all fish and fish products, except shrimp, 60 days after the tuna ban goes into effect. This embargo applies only if the nation fails to implement the moratorium or has not taken the necessary actions to remedy its failure to comply with the other commitments described in subsection (a). Paragraph (3) extends the embargo to include shrimp and shrimp products after 90 days under the same conditions described in paragraph (2).

The Committee understands that inadvertent occasional failures to comply with the requirement of 100 percent observer coverage on purse seine vessels may occur, or that a nation may fail by a small margin to meet the requirement of reducing its dolphin mortalities prior to the moratorium by a statistically significant amount. It is the Committee's intent that the bans on imports of fish, fish products, shrimp, and shrimp products will apply only if a nation is not making a good faith effort to correct these occasional failures to comply, or if the nation is not complying with the moratorium on encircling dolphins.

Paragraph (4) establishes that the bans will stay in effect until the Secretary of Commerce determines that the country is implementing its commitments.

Subsection (c) requires the Secretaries of State and Commerce to periodically review the activities of nations who have committed to the moratorium and to include the results of those reviews in the Secretary's annual report to the Congress.

Section 306. Permits for taking dolphins

Subsection 306(a) modifies the existing general MMPA permit granted to the American Tunaboat Association. Paragraph (1) limits the total number of dolphin mortalities to 1,000 for 1992 and 800 for 1993 and the first three months of 1994.

Paragraph (2) does not represent a change from existing law, which prohibits encircling any school of dolphins in which eastern spinner dolphins or coastal spotted dolphins are observed. The

Committee expects that the Secretary of Commerce will take the appropriate regulatory actions to condition research sets or encirclement of other dolphin species consistent with findings on depleted or threatened species.

Paragraph (3) revokes the general permit effective with the beginning of the moratorium.

Subsection (b) states that the existing requirements of the MMPA relative to research permits or other permits to take marine mammals apply to this title.

Section 307. Prohibitions

Subsection 307(a) assures that the U.S. market will not serve as an incentive for the harvesting of dolphin-unsafe tuna by establishing a dolphin-safe tuna market in the United States.

Paragraph (1) makes it unlawful for anyone to sell, purchase, offer for sale, transport, or ship any dolphin-unsafe tuna product in the U.S. after June 1, 1994. Given that H.R. 5419 allows tuna to be harvested with dolphin-unsafe methods through February 28, 1994, the Committee does not intend that tuna processors, wholesalers, or others should be deprived of the ability to sell possible remaining stocks of such tuna. This provision of the bill is therefore intended to allow a 90-day period following the effective date of the moratorium for the sale of remaining stocks of dolphin-unsafe tuna.

Paragraph (2) prohibits U.S. vessels and persons subject to U.S. jurisdiction from intentionally encircling dolphins with purse seine nets after the effective date of the moratorium except for research purposes or unless the moratorium is terminated under section 302 of this title.

Paragraph (3) states that it is unlawful to import into the U.S. any fish or fish products in violation of a ban on those products under section 305.

Paragraph (4) states that it is unlawful to violate regulations promulgated under this title, and paragraphs (5) and (6) establish the enforcement mechanisms of the bill.

Subsection (b) extends the existing penalty provisions of the MMPA to this title. The Committee recognizes the possibility that tuna processing companies may occasionally unknowingly purchase tuna products that contain some dolphin-unsafe tuna. The Committee intends that the penalty and forfeiture provisions of this title will be applied to persons who knowingly and willfully violate subsection (a).

Subsection (c) extends the existing forfeiture provisions of the Magnuson Fishery Conservation and Management Act to this title, and subsection (d) defines "dolphin-unsafe" tuna.

Section 308. Authorization of appropriations

Subsection (a) authorizes $3,000,000 in each of the fiscal years 1993, 1994, 1995, 1996, 1997, and 1998 to be appropriated to NMFS to carry out the provisions of this title.

Subsection (b) amends the MMPA table of contents.

Subsection (c) defines the terms "fishery", "competent regional organization", and "intermediary nation". It is the Committee's opinion that the court's intepretation of the term "intermediary nation" went beyond the intent of Congress in the 1988 amendments to the MMPA, and that a clarification of the term is necessary.

SECTION 3. AMENDMENTS TO TUNA CONVENTIONS ACT OF 1950 AND SOUTH PACIFIC TUNA ACT OF 1988

Subsection (a) amends the Tuna Conventions Act of 1950 by requiring that one of the U.S. Commissioners to the IATTC be a representative from a nongovernmental conservation organization, and that nongovernmental conservation organizations be among the interests represented on the Advisory Committee to the U.S. Commissioners.

Subsection (b) extends the authorization for the South Pacific Tuna Act of 1988 through 2002.

Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 5419 would have no significant inflationary impact upon prices and costs in the operation of the national economy.

Cost of the Legislation

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate by the Committee of the costs which would be incurred in carrying our H.R. 5419. However, clause 7(d) provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

Compliance With House Rule XI

1. The Subcommittee on Fisheries and Wildlife Conservation and the Environment held hearings on the subject of this legislation on March 18, 1992.

2. With respect to the requirement of clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, H.R. 5419 does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Operations on the subject of H.R. 5419.

4. With respect to the requirement of clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 5419 from the Director of the Congressional Budget Office.

DISSENTING VIEWS TO H.R. 5419 OF REPRESENTATIVE RANDY "DUKE" CUNNINGHAM

I am strongly opposed to the International Dolphin Conservation Act of 1992, H.R. 5419, which will substitute a dubious, unilateral policy for a truly effective multilateral regime. I believe the bill is based on assumptions which are no longer relevant. H.R. 5419 disregards the recommendations of a comprehensive National Academy of Sciences (NAS) report. The bill does not implement the provisions of the Inter-American Tropical Tuna Commission (IATTC), in which nine countries (Colombia, Costa Rica, Ecuador, Mexico, Panama, Spain, United States, Vanuatu, and Venezuela) agreed to a multilateral approach. Rather, H.R. 5419 relies on a unilateral approach, which will damage U.S. industry and world tuna stocks. Nevertheless, H.R. 5419 was favorably reported by the Merchant Marine and Fisheries Committee.

This legislation completely ignores the outstanding record of dolphin mortality reduction by the international tuna fleet operating in the Eastern Tropical Pacific (ETP) since the 1988 amendments to the MMPA. It also disregards the findings of the NAS report which concluded that there were in excess of 8 million dolphin in the ETP alone, and that the best way for the United States to address the tuna/dolphin issue was to work cooperatively with the other fishing nations of the region to reduce the incidental take of dolphins. The NAS report emphasized the need for international cooperation and participation in an extensive research program to further improve the existing dolphin release technology while investigating alternative methods for catching the larger yellowfin tuna of the area without encircling dolphins. Yet, H.R. 5419 fails to heed the same NAS report which Congress requested several years ago.

More importantly, H.R. 5419 does not even acknowledge the recently concluded IATTC tuna/dolphin agreement which has been endorsed by all of the nations which fish in the ETP and most of the nations bordering the ETP fishery. This agreement and the resolution which accompanies it provide a truly multilateral commitment toward reducing the incidental take of dolphins and increase the international commitment to research as recommended in the NAS report.

Proponents of the bill have stated that this legislation is supported by major tuna fishing nations. However, the Committee ignored the fact that I have been told personally by the Venezuelan Minister of Fisheries that his government does not endorse the bill and strongly supports the IATTC approach. Vanuatu, a major tuna fishing nation, also opposes this bill. After conversations with senior Mexican officials, I believe that Mexico also disagrees with H.R. 5419. As the substance of the bill becomes better known, I fully expect additional opposition to emerge.

As a Member of Congress who represents many tuna fishermen, I am proud of their record in reducing the incidental take of dolphins to just 1,000 last year, with a release rate of 99.8 percent. I am even more proud of the role that the tuna industry has played in getting all of the ETP nations to enter into the recently concluded IATTC agreement. The IATTC multilateral commitment to lower the dolphin mortality rate over the next seven years insures that the dolphin population will continue to grow and that precious yellowfin tuna stocks will not be damaged by overfishing small, immature tuna in the Western Tropical Pacific.

Finally, I share the U.S. tuna industry's view that the tuna/dolphin issue should be addressed on a multilateral basis, and not through unilateral actions by the United States. I cannot support the elimination of our tuna industry in the ETP. In the long run, this bill will increase dolphin mortality, close the ETP to U.S. boats forever, and leave the most valuable mature yellowfin tuna fishery to flags of convenience vessels with little concern for dolphin mortality. The United States tuna industry could lose as many as 1,000 jobs from this legislation. In the short term, it would lift the embargoes against Mexico and Venezuela and allow them to start exporting "dolphin-unsafe" canned tuna to the United States.

This legislation is unnecessary and counterproductive. I urge the House to reject H.R. 5419.

RANDY "DUKE" CUNNINGHAM.

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102D CONGRESS 2d Session | HOUSE OF REPRESENTATIVES | REPT. 102-746 Part 2

INTERNATIONAL DOLPHIN CONSERVATION ACT OF 1992

JULY 31, 1992.— Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ROSTENKOWSKI, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H.R. 5419]

[Including cost estimate of the Congressional Budget Office]

The Committee on Ways and Means, to whom was referred the bill (H.R. 5419) to amend the Marine Mammal Protection Act of 1972 to authorize the Secretary of State to enter into international agreements to establish a global moratorium to prohibit harvesting of tuna through the use of purse seine nets deployed on or to encircle dolphins or other marine mammals, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (to the introduced bill) are as follows:

In title III of the Marine Mammal Protection Act of 1972, as proposed to be added by section 2(a) of the bill—

(1) strike out "**PROGRAM.**" in the heading to proposed section 303 and insert "**PROGRAMS.**";

(2) strike out "the agreement" in proposed section 304(a)(3) and insert "agreements entered into under section 302";

(3) strike out "Act" in proposed section 304(a)(6) and insert "*title*";

(4) strike out "an agreement" in proposed section 304(b) and insert "agreements entered into";

(5) strike out "TUNA AND and insert "YELLOWFIN TUNA AND" in the sideheading to proposed section 305(b)(1);

(6) strike out paragraph (3) of proposed section 305(b)(2);

(7) redesignate paragraph (4) of proposed section 305(b) as paragraph (3) and in such redesignated paragraph strike out "(1), (2), or (3)" and insert "(1) or (2)";

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(8) strike out "international agreement" in proposed section 306(b) and insert "agreement entered into";

(9) strike out paragraph (3) of proposed section 307(a) and insert the following:

> "(3) for any person to import any yellowfin tuna or yellowfin tuna product or any other fish or fish product in violation of a ban on importation imposed under section 305(b)(1) or (2);

(10) in the entry for section 302 in the table of contents contained in section 2(b) of the bill, strike out "agreement" and insert "agreements"; and

(11) strike out "FISHERY DEFINED" in the sideheading to section 2(c) of the bill and insert "DEFINITIONS".

In section 3(a) of the bill—

(1) insert "is amended—" after "Act";

(2) strike out "952" in subsection (a)(1) and insert "3"; and

(3) strike out "953" in subsection (a)(2) and insert "4".

BACKGROUND, PURPOSE, AND JUSTIFICATION

The Marine Mammal Protection Act (MMPA) was enacted in 1972 for the purpose of protecting marine mammals, including dolphins, from the adverse effects of human activities. For reasons not fully understood, schools of large yellowfin tuna associate with schools of dolphins in the eastern tropical Pacific Ocean (ETP). Since the late 1950's, fishermen have used the dolphins to locate tuna, and then deployed large purse seine nets around dolphins to harvest the tuna swimming beneath them. During the process, dolphins can become trapped in the nets and drown. It has been estimated that more than 6 million dolphins have been killed by U.S. and foreign fishermen in the ETP since 1959. Indeed, the number of dolphins killed in the ETP tuna fishery was one of the driving factors behind passage of the MMPA in 1972.

The MMPA directs the Secretary of the Treasury to ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards. In carrying out the ban, the Secretary, in the case of yellowfin tuna harvested with purse seine nets in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, shall require that the government of the exporting nation provide certain documentary evidence relating to that country's marine mammal conservation programs. The Secretary shall also require the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under the Act.

Due to the requirements of the MMPA and improvements in fishing technology, U.S. tuna fishermen have reduced dramatically their kill of dolphins in the ETP (from 360,000 in 1972 to 20,000 in 1981). Since 1981, the U.S. tuna fleet has operated under MMPA

regulations that permit up to 20,500 dolphins to be killed annually. However, continually improved technology and the fact that all but seven U.S. tuna vessels from the ETP relocated to the south Pacific Ocean combined to reduce the kill of the U.S. fleet in 1991 to about 1,000 dolphins. At the same time, the foreign fleet in the ETP killed some 25,000 dolphins in the ETP in 1991.

In 1984, the MMPA was amended to require that each nation wishing to export tuna to the United States document that it had adopted a dolphin conservation program "comparable" to that of the U.S. fleet. This requirement was strengthened in 1990. In August 1990, Mexico's yellowfin tuna was embargoed under the comparability provision. In accordance with GATT procedures, Mexico challenged the U.S. embargo and in September 1991, a GATT panel found in favor of Mexico. Venezuelan exports of yellowfin tuna to the United States were also embargoed and Venezuela began a GATT case against the United States in May 1992. A third GATT challenge was brought by the European Community (EC) in June 1992, after a Federal district court ruled that the MMPA also required a secondary embargo of tuna products from some 20 intermediary nations, including those of the EC, that had failed to certify and offer reasonable proof that they had acted to prohibit the importation of tuna from the primary embargoed nations.

In the past several years, virtually all U.S. canners of tuna products have announced that they would no longer purchase any tuna caught in association with dolphins and would henceforth label their cans of tuna with "dolphin-safe" symbols. During the same time, the Administration successfully negotiated a fisheries treaty with nations of the South Pacific region which will permit all existing U.S. tuna purse seine vessels, including those now fishing in the ETP, to fish in the dolphin-safe waters of the South Pacific at least through the year 2002.

On March 3, 1992, the Departments of State and Commerce submitted a legislative proposal to the Congress aimed at promoting international dolphin protection and resolving the GATT trade disputes. After conducting hearings on the proposal and consulting further with the Administration and interested private sector groups on the issue, Mr. Studds, Chairman of the Subcommittee on Fisheries and Conservation and the Environment, on June 17, 1992, introduced H.R. 5419, a bill to establish a global moratorium on the practice of harvesting tuna by intentionally encircling dolphins with purse seine nets.

On June 18, 1992, the Interamerican Tropical Tuna Commission (IATTC) adopted a multilateral resolution to reduce dolphin mortalities in the eastern Tropical Pacific. The IATTC consists of nations that either fish for tuna in the eastern Tropical Pacific or purchase large quantities of tuna from the region. These countries include the United States, France, Japan, Venezuela, Panama, Costa Rica, Nicaragua, and Vanuatu. In addition, four countries not member to the IATTC adopted the resolution: Mexico, Colombia, Ecuador, and Spain.

The IATTC resolution contains provisions which would limit dolphin mortalities in the eastern Tropical Pacific tuna fishery to 19,500 in 1993, a figure that would gradually fall to less than 5000

in 1999. These limits would be assigned on a per-vessel basis and all purse seine vessels would require observers. An international research program on methods of reducing dolphin mortalities would be established. The American Tunaboat Association, which represents boat owners who fish in the eastern Tropical Pacific, supports the resolution. The Administration supports the resolution if H.R. 5419 is not enacted into law. The environmental community is opposed to the resolution due to the fact that it allows 75,000 dolphin mortalities through 1999, and never eliminates mortalities.

H.R. 5419 is intended to strengthen international cooperation in the protection of dolphins and other marine mammals, and to make it possible for the United States to lift the current ban on imports of tuna and tuna products from Mexico, Venezuela, and some twenty other countries.

SUMMARY OF H.R. 5419, AS AMENDED

The purpose of H.R. 5419 is to establish an international moratorium on the practice of harvesting tuna through the use of purse seine nets deployed on or to encircle dolphins or other marine mammals. The bill, as amended, amends the MMPA by creating a new title, Title III, setting forth provisions on a global moratorium to prohibit certain tuna harvesting practices. New sections 301–308 would be established under the new title.

Section 301 sets forth a number of findings and determinations. Among others, these include: (1) the yellowfin tuna fishery of the ETP has resulted in millions of dolphin deaths; (2) other governments have indicated their willingness to reduce and eventually eliminate dolphin mortalities associated with the seine fishery in the ETP; (3) it is U.S. policy to eliminate marine mammal mortalities resulting from intentional encirclement of dolphins in tuna purse seine fisheries; (4) it is U.S. policy to secure international agreements to reduce and eventually eliminate dolphin mortalities in the ETP; and (5) it is U.S. policy to ensure that U.S. tuna fishing vessels have access to productive tuna fishing grounds outside of the ETP.

Section 302 authorizes the Secretary of State to enter into international agreements which establish a global moratorium of at least 5 years' duration on the practice of intentionally encircling dolphins with purse seine nets during tuna fishing operations. Such moratorium is to take effect on March 1, 1994. A procedure is established by which the United States could withdraw from a 5-year moratorium prior to December 31, 1999.

Section 303 requires that international agreements establishing a moratorium have an international research component. The goals of such research are to develop methods of fishing for large yellowfin tuna without encircling dolphins and by encircling dolphins without causing mortalities. Such programs must be conducted under the auspices of a competent regional organization. Research cruises in the ETP must be carried out for research purposes only and have an observer on board. The number of research sets during which dolphins are encircled is limited to 400 annually and the total dolphin mortality during research sets to 1000 annually.

Section 304 requires the Secretary of Commerce to submit annual reports to the Congress on actions taken pursuant to the bill. It also establishes the requirements that must be fulfilled before the Secretary can recommend to the Congress that the moratorium be lifted.

Section 305 establishes that the existing embargo provisions of section 101 of the MMPA will not apply to nations that enter into commitments with the United States to: (1) implement a moratorium on encircling dolphins with purse seine nets effective March 1, 1994; (2) require observers on all their purse seine vessels larger than 400 short tons; and (3) reduce their dolphin mortalities up until the effective date of the moratorium. The Secretaries of State and Commerce must periodically determine whether countries that have committed to the moratorium are implementing their commitments. The section also establishes a series of import bans on nations that fail to comply with their commitments. Fifteen days after a country has been certified as having failed to implement its commitments, its yellowfin tuna and yellowfin tuna products will be banned from entry into the United States. The ban is extended to all fish and fish products, except shrimp, after sixty days if the nation does not bring itself into compliance.

Section 306 modifies the existing general MMPA permit granted to the American Tunaboat Association. It limits the total number of dolphin mortalities to 1,000 for 1992 and 800 for 1993 and the first three months of 1994. It revokes the general permit effective with the beginning of the moratorium.

Section 307 assures that the U.S. market will not serve as an incentive for the harvesting of dolphin-unsafe tuna by establishing a dolphin-safe tuna market in the United States. It makes it unlawful for anyone to sell, purchase, offer for sale, transport, or ship any dolphin-unsafe tuna product in the United States after June 1, 1994.

Section 308 authorizes $3 million to be appropriated to the National Marine Fisheries Service to carry out the provisions of this title. It also defines several terms. These include the term "intermediary nation," which is defined so as to rectify the recent district court ruling that went beyond the intent of Congress when it first passed the MMPA.

The bill also makes several amendments to the Tuna Conventions Act of 1950 and the South Pacific Tuna Act of 1988.

ACTION ON H.R. 5419 BY THE COMMITTEE ON MERCHANT MARINE AND FISHERIES

Upon introduction, H.R. 5419 was referred to the Committee on Merchant Marine and Fisheries. After the bill was favorably reported, with amendments, by the Subcommittee on Fisheries and Conservation and the Environment, it was considered by the full Committee on Merchant Marine and Fisheries on July 2, 1992. After a discussion regarding the bill's potential impacts on the U.S. tuna fishing industry, a motion to send the bill back to the Subcommittee was defeated by a division vote of 16–8. The Committee then ordered the bill to be reported favorably, with amendments, to the House by a vote of 32–12.

COMMITTEE ACTION

Chairman Rostenkowski sent a letter to the Speaker on June 29, 1992, requesting sequential referral of H.R. 5419. Sequential referral was granted to the Committee on July 29, 1992 through August 3, 1992. On July 23, 1992, in anticipation of receiving sequential referral on the bill, the Subcommittee, by voice vote, ordered reported, with an amendment, H.R. 5419 as it was ordered reported by the Committee on Merchant Marine and Fisheries. The amendment adopted by the Subcommittee would exclude shrimp and shrimp products from the coverage of the bill's import bans.

On July 29, 1992, the Committee on Ways and Means ordered H.R. 5419 favorably reported, with amendments, by voice vote.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This section states that the short title of the bill is the International Dolphin Conservation Act of 1992.

SECTION 2. GLOBAL MORATORIUM TO PROHIBIT CERTAIN TUNA HARVESTING PRACTICES

Section 2 amends the MMPA by creating a new title, Title III, establishing a global moratorium to prohibit certain tuna harvesting practices. New sections 301–308 would be established under the new title.

Section 301. Findings and policy

Subsection 301(a) of the MMPA, as amended by the new title, finds that the yellowfin tuna fishery of the ETP has resulted in millions of dolphin deaths and that, as a result, increased concern for dolphin populations has encouraged a global change in fishing methods. This subsection also credits the U.S. tuna fishing industry with developing methods to reduce dolphin mortalities, and the U.S. tuna processing companies with voluntarily establishing a dolphin-safe policy. In addition, the subsection recognizes that other governments have indicated their willingness to reduce and eventually eliminate dolphin mortalities associated with the purse seine fishery in the ETP.

Subsection (b) determines that it is U.S. policy to eliminate marine mammal mortalities resulting from international encirclement of dolphins in tuna purse seine fisheries. The Committee used the term "international" to distinguish this practice from other fishing methods in which marine mammals may be accidentally killed or injured during the course of normal fishing operations. The Committee recognizes that in other fisheries, including other purse seine fisheries, marine mammals are not specifically targeted for encirclement or net deployment as they are in the yellowfin tuna purse seine fishery in the ETP.

This subsection also establishes that it is U.S. policy to secure international agreements to reduce and eventually eliminate dolphin mortalities in the ETP, to encourage the use of observers on non-U.S. vessels, and to ensure that the U.S. market does not act as an incentive for the harvest of dolphin-unsafe tuna. Finally, subsection 301(b) determines that it is U.S. policy to ensure that U.S. tuna fishing vessels have access to productive tuna fishing grounds outside of the ETP.

Section 302. International agreements to establish a global moratorium to prohibit certain tuna harvesting practices

Subsection 302(a) authorizes the Secretary of State to enter into international agreements which establish a global moratorium of at least 5 years' duration on the practice of intentionally encircling dolphins with purse seine nets during tuna fishing operations. While the Committee recognizes that the Secretary of State does not require Congressional authority to enter into such international agreements, the Committee intends that this subsection will serve to encourage the Secretary to do so.

Subsection (b) specifies the terms of international agreements entered into pursuant to 301(a). The subsection establishes that the moratorium is to take effect on March 1, 1994. This date was determined during the initial Department of State negotiations with Mexico and Venezuela resulting in the Administration's proposal of March 3, 1992. Terms of agreement shall also include an international research program, and reviews and reports of the research conducted under that program. This subsection also requires each country that is a party to the agreement to take whatever steps may be necessary to comply with the moratorium, and to encourage other countries to enter into the moratorium.

Subsection (c) establishes a procedure by which the U.S. could withdraw from a five-year moratorium prior to December 31, 1999. Under this procedure, the Secretary of Commerce is required to submit a recommendation to the Congress that the moratorium be terminated. Section 304 establishes the procedures by which such a recommendation could be made. The recommendation must then be approved by a joint resolution initiated in either House of Congress. The Committee does not intend that this procedure should be used for unilateral action on the part of the U.S. to terminate the moratorium without an international agreement to do so, as established in section 304.

Section 303. Research programs

This section requires agreements establishing a moratorium to have an international research component. Section 303 introduces the concept of a "competent regional organization" into H.R. 5419. This term is defined in section 308 of the bill.

Subsection 303(a) states that the research program must have two goals: to develop methods of fishing for large yellowfin tuna (1) without encircling dolphins, and (2) by encircling dolphins without causing mortalities. This subsection also requires that the international research program be conducted under the auspices of a competent regional organization, and that research cruises be conducted by vessels that encircle dolphins solely for research purposes and not for commercial harvest. Research cruises must also have an observer on board.

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and (3) recognize the role of the IATTC, as the competent regional organization in the ETP, in reviewing research procedures.

In subsection (c), paragraph (1) requires that funding for research be established in a fair and equitable manner. The Committee intends that research funds should be fairly distributed among the nations that participate in, and adhere to the requirements of, an international research program. Paragraph (2) states that, to the extent possible, the proceeds of tuna harvested during research cruises should be used to fund the research program.

Paragraph (3) requires funding provided by the U.S. for research to be used only for developing alternative methods of fishing that do not involve encircling dolphins. This paragraph does not represent a change from existing U.S. policy. Finally, paragraph (4) requires that the Marine Mammal Commission review research proposals to the IATTC and recommend an appropriate response to the U. S. Commissioners to the IATTC.

Section 304. Reviews, reports, and recommendations

Subsection (a) requires the Secretary of Commerce to submit annual reports to the Congress on actions taken pursuant to the bill.

Subsection (b) establishes the requirement that must be fulfilled before the Secretary can recommend to the Congress that the moratorium be lifted. The Committee expects that a Secretarial recommendation to lift the moratorium prior to December 31, 1999, will be based on proof from a competent regional organization or other nation that a method of encircling dolphins without mortalities has been developed, or dolphin-safe methods of fishing have negatively affected yellowfin tuna stocks to a major degree. The Committee also expects the Secretary to consult with the Marine Mammal Commission prior to making recommendation.

Section 305. International commitments

Subsection 305(a) establishes that the existing embargo provisions of section 101 of the MMPA will not apply to nations that formally commit to (1) implementing a moratorium on encircling dolphins with purse seine nets effective March 1, 1994; (2) requiring observers on all their tuna purse seine vessels larger than 400 short tons carrying capacity; and (3) reducing their dolphin mortalities up until the effective date of the moratorium.

Subsection (b) requires the Secretaries of State and Commerce to periodically determine whether countries that have committed to the moratorium are implementing their commitments. The Committee expects that such determinations will occur at intervals of no less than six months. This subsection also establishes a series of import bans on nations that fail to comply with their commitments under an international agreement.

Paragraph (1) requires that, 15 days after a nation has been certified for failing to implement all the commitments described in subsection 305(a), its yellowfin tuna and yellowfin tuna products will be banned from entry into the U.S.

Paragraph (2) extends the ban to all fish and fish products, except shrimp, 60 days after the tuna ban goes into effect. This embargo applies only if the nation fails to fully implement the moratorium or has not taken the necessary actions to remedy its failure to comply with the other commitments described in subsection (a).

The Committee understands that inadvertent occasional failures to comply with the requirement of 100% observer coverage on purse seine vessels may occur, or that a nation may fail by a small margin to meet the requirement of reducing its dolphin mortalities prior to the moratorium by a statistically significant amount. It is the Committee's intent that the bans on imports of fish and fish products, except shrimp, will apply only if a nation is not making a good faith effort to correct these occasional failures to comply, or if the nation is not complying with the moratorium on encircling dolphins.

Paragraph (4) establishes that the bans will stay in effect until the Secretary of Commerce determines that the country is implementing its commitments.

Subsection (c) requires the Secretaries of State and Commerce to periodically review the activities of nations who have committed to the moratorium and to include the results of those reviews in the Secretary's annual report to the Congress.

Section 306. Permits for taking dolphins

Subsection 306(a) modifies the existing general MMPA permit granted to the American Tunaboat Association. Paragraph (1) limits the total number of dolphin mortalities to 1000 for 1992 and 800 for 1993 and the first three months of 1994.

Paragraph (2) does not represent a change from existing law, which prohibits encircling any school of dolphins in which eastern spinner dolphins or coastal spotted dolphins are observed. The Committee expects that the Secretary of Commerce will take necessary regulatory action to condition research sets or encirclement of other dolphin species consistent with findings on depleted or threatened species.

Paragraph (3) revokes the general permit effective with the beginning of the moratorium.

Subsection (b) states that the existing requirements of the MMPA relative to research permits or other permits to take marine mammals apply to this title.

Section 307. Prohibitions

Subsection 307(a) assures that the U.S. market will not serve as an incentive for the harvesting of dolphin-unsafe tuna by establishing a dolphin-safe tuna market in the United States.

Paragraph (1) makes it unlawful for anyone to sell, purchase, offer for sale, transport, or ship any dolphin-unsafe tuna product in the United States after June 1, 1994. Given that H.R. 5419 allows tuna to be harvested with dolphin-unsafe methods through February 28, 1994, the Committee does not intend that tuna processors, wholesalers, or others should be deprived of the ability to sell possible remaining stocks of such tuna. This provision of the bill is therefore intended to allow a 90-day period following the effective date of the moratorium for the sale of remaining stocks of dolphin-unsafe tuna.

Paragraph (2) prohibits U.S. vessels and persons subject to U.S. jurisdiction from intentionally encircling dolphins with purse seine

nets after the effective date of the moratorium except for research purposes or unless the moratorium is terminated under section 302 of this title.

Paragraph (3) states that it is unlawful to violate regulations promulgated under this title, and paragraphs (4) and (5) establish the enforcement mechanisms of the bill.

Subsection (b) extends the existing penalty provisions of the MMPA to this title. The Committee recognizes the possibility that tuna processing companies may occasionally unknowingly purchase tuna products that contain some dolphin-unsafe tuna. The Committee intends that the penalty and forfeiture provisions of this title will be applied to persons who knowingly and willfully violate subsection (a).

Subsection (c) extends the existing forfeiture provisions of the Magnuson Fishery Conservation and Management Act to this title, and subsection (d) defines "dolphin-safe" tuna.

Section 308. Authorization of appropriations

Subsection (a) authorizes $3,000,000 to be appropriated to NMFS to carry out the provisions of this title.

Subsection (b) amends the MMPA table of contents.

Subsection (c) defines the terms "fishery", "competent regional organization", and "intermediary nation." It is the Committee's opinion that the court's interpretation of the term "intermediary nation" went beyond the intent of Congress in the 1988 amendments to the MMPA, and that a clarification of the term "intermediary nation" is necessary.

SECTION 3. AMENDMENTS TO TUNA CONVENTIONS ACT OF 1950 AND SOUTH PACIFIC TUNA ACT OF 1988

Subsection (a) amends the Tuna Conventions Act of 1950 by requiring that one of the U.S. Commissioners to the IATTC be a representative from a nongovernmental conservation organization, and that nongovernmental conservation organizations be among the interests represented on the Advisory Committee to the U.S. Commissioners.

Subsection (b) extends the authorization for the South Pacific Tuna Act of 1988 through 2002.

102D CONGRESS 1st Session | HOUSE OF REPRESENTATIVES | REPT. 101-262 Part 1

UNITED STATES INTERNATIONAL DRIFTNET FISHERY CONSERVATION PROGRAM

OCTOBER 22, 1991.—Ordered to be printed

Mr. JONES of North Carolina, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H.R. 2152]

[Including cost estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 2152) to enhance the effectiveness of the United Nations international driftnet fishery conservation program, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

TITLE I—HIGH SEAS LARGE-SCALE DRIFTNET FISHING

SEC. 101. DENIAL OF PORT PRIVILEGES AND SANCTIONS FOR HIGH SEAS LARGE-SCALE DRIFTNET FISHING.

(a) DENIAL OF PORT PRIVILEGES.—

(1) PUBLICATION OF LIST.—Not later than 10 days after the date of the enactment of this Act and periodically thereafter, the Secretary of Commerce, in consultation with the Secretary of State, shall publish a list of countries that conduct, or do not prohibit their nationals from conducting, large-scale driftnet fishing beyond the exclusive economic zone of any country.

(2) DENIAL OF PORT PRIVILEGES.—The Secretary of the Treasury shall, in accordance with recognized principles of international law—

(A) withhold or revoke the clearance required by section 4197 of the Revised Statutes of the United States (46 App. U.S.C. 91) for; and

(B) deny entry to any place in the United States and to the navigable waters of the United States to;

any large-scale driftnet fishing vessel that is registered under the laws of a country included in a list published under paragraph (1).

(3) NOTIFICATION OF COUNTRY.—Before the publication of a list of countries under paragraph (1), the Secretary of State shall notify each country included in that list regarding—

Purpose of the Bill

The purpose of H.R. 2152 is to enhance the effectiveness of United Nations Resolution No. 44-225 and bring an end to the practice of large-scale driftnet fishing on the high seas.

Background and Need for Legislation

INTRODUCTION

Large-scale driftnet fishing is a method of fishing in which a gillnet composed of a panel or panels of webbing, with a total length of one and one half miles or more, is placed in the water and allowed to drift with the currents and winds. These nets, which are usually made of nearly invisible monofilament line, entangle virtually everything that comes in contact with them. Often fished in lengths exceeding 30 miles, large-scale driftnets are distinguished by their method of harvest, indiscriminately killing not only non-targeted fish, but dolphins, whales, turtles and seabirds.

The fishery of greatest concern today is the large-scale driftnet fishery in the North Pacific Ocean which became commercially important in the mid 1970's and continued to grow until the late 1980's. Fishermen from Japan, Taiwan and the Republic of Korea used large-scale driftnets to target various species of salmon, squid, and tuna. This buildup of the foreign driftnet fleets on the high seas led to a commensurate increase in the mortality of seabirds, marine mammals, and U.S. origin salmon. At the height of the high seas large-scale driftnet fishery in the late 1980's over 800 foreign vessels were fishing in the North Pacific Ocean. In addition to the devastating effects this fishery was having on the returns of U.S. salmon and steelhead to native streams, National Marine Fisheries Service [NMFS] scientists estimated that tens of thousands of marine mammals were taken in the 50,000 net retrievals each year.

Since the mid 1980's several important domestic and international actions have shaped U.S. policy towards eliminating these driftnet fishing operations. A discussion of those major events follows.

1987 DRIFTNET ACT

In response to concern over the dramatic effects the large-scale, high seas driftnet fishery was having on U.S. marine resources, Congress passed the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (P.L. 100-220). The Act was intended to monitor, assess, and reduce the adverse impacts of large-scale driftnets.

This goal was especially difficult because the fishery of concern was being conducted in the international waters of the North Pacific, outside U.S. jurisdiction.

The major provisions of the Act included requirements that:

the Secretary of Commerce immediately negotiate monitoring agreements with nations conducting large-scale driftnet fishing in the North Pacific. Under the agreements, U.S. scientists were required to be stationed onboard foreign vessels driftnet fishing on the high seas. Acting as observers, the scientists would be able to collect statistically reliable information on the number of U.S.marine resources that were killed or discarded by these vessels.

the Secretary of Commerce immediately negotiate effective enforcement agreements with those same nations for the purpose of monitoring compliance with U.S. and foreign laws related to driftnet fishing.

the Secretary of Commerce determine whether an appropriate foreign government has failed to enter into and implement an enforcement agreement. A negative determination mandates that the Secretary certify that fact to the President for purposes of certification under section 8(a) of the Fishermen's Protective Act of 1967.

As a result of the 1987 Act, agreements were negotiated with Japan, Taiwan, and the Republic of Korea. Those agreements are scheduled to be terminated on June 30, 1992 when the U.N. moratorium enters into force. In July 1991, Taiwan and Korea were both found to be in violation of these agreements and were certified as such by the Secretary under section 8(a) of the Fishermen's Protective Act of 1967.

THE WELLINGTON CONVENTION

The Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, also known as the Wellington Convention [Convention], was agreed to in November 1989 by more than 20 South Pacific nations, the U.S., and France. The Convention was developed in response to concern by many of the island nations that marine resources in the South Pacific were being eradicated by large-scale driftnet vessels from Japan, Taiwan, and Korea. The Convention prohibits fishermen of member nations from engaging in large-scale driftnet fishing in the South Pacific and encourages those member nations to take additional measures to discourage this practice by non-member nations. These measures include prohibiting nations from drift net fishing within Convention nation's Seclusive Economic Zones [EEZ]; prohibiting the transshipment, landing, or processing of drift net caught fish within areas under the jurisdiction of the signatory nations; and encouraging non-signatory nations comply with or become party to the Convention.

The Convention set July 1, 1991, as the date for the cessation of large-scale drift net fishing operations in the South Pacific. As a result of the Convention, virtually all large-scale drift net fishing has ceased in the South Pacific Ocean.

UNITED NATIONS RESOLUTION NO. 44-225

Adopted by the U.N. General Assembly on December 22, 1989, the Resolution is the single most important statement by the international community concerning the elimination of large-scale drift net fishing on the high seas.

The Resolution recognizes international efforts to curb large-scale drift net fishing and calls on all countries to respect these efforts. It recommends that large-scale drift net fishing in the South Pacific cease by July 1, 1991 reinforcing the Wellington Convention. The Resolution encourages coastal countries to cooperate in collection and submission of scientific information on drift net fishing in their own EZZ's.

Most important, however, is the recommendation that all members of the international community agree to cease large-scale, pelagic driftnet fishing on the high seas by June 30, 1992. Specifically the Resolution recommends that all nations agree to a:

> Moratorium on all large-scale pelagic driftnet fishing on the high seas by June 30, 1992 with the understanding that such a measure will not be imposed in a region, or if implemented can be lifted, should effective conservation and management measures be taken based upon statistically sound analysis to be jointly made by concerned parties of the international community with an interest in the fishery resources of the region, to prevent unacceptable impacts of such fishing practices in that region and to ensure the conservation of the living marine resources of that region.

The language of the Resolution is critical because those nations able to demonstrate that large-scale driftnet fishing can be conducted in a harmless manner would be allowed to continue this practice. The U.S. and other concerned nations have already submitted interpretations of the Resolution to the U.N. While the U.S. has made it clear that it is unaware of any effective conservation measures relating to the use of large-scale driftnets, other countries such as Japan have indicated they do not believe that the scientific data supports a moratorium.

FISHERY CONSERVATION AMENDMENTS OF 1991

The 1991 amendments to the Magnuson Fishery Conservation and Management Act contained several provisions pertaining to driftnets. In particular, the amendments direct the Secretary of Commerce, through the Secretary of State, to secure an international ban on the use of large-scale driftnets as called for in U.N. Resolution No. 44-225, prohibit the use of large-scale driftnets by any vessel within the U.S. EEZ, and prohibit the use of these nets by U.S. fishermen anywhere in the oceans.

As a means of discouraging driftnet fishing by other nations and to allow our fishermen to compete fairly in our markets, the amendments also prohibit the importation of fish or fish products caught with large-scale driftnets in the South Pacific and tuna caught with driftnets on the high seas after July 1, 1991, and prohibit the importation of any fish or fish products caught with large-scale driftnets anywhere on the high seas after July 1, 1992.

LETTERS TO AMBASSADORS

On September 20, 1991, the members of the Subcommittee on Fisheries and Wildlife Conservation and the Environment sent letters to the ambassadors of each of seven nations whose fishermen are known or suspected to be using large-scale driftnets on the high seas (Japan, Taiwan, the Republic of Korea, Germany, Ireland, Great Britain and France). The letter expressed the Subcommittee's opposition to the continued use of driftnets longer than 2.5 kilometers in length and its support of the moratorium called for by the U.N. Resolution. Explaining that the Subcommittee believes strict adherence to the U.N. Resolution by all nations is essential to the conservation of marine life, the letter urges each country to fully implement the moratorium and prohibit its fishermen from using large-scale driftnets on the high seas after June 30, 1992.

As of October 17, 1991, Ireland, Taiwan, and Great Britain had responded to the letter, indicating their intent to prohibit their nationals from high seas driftnet fishing after June 30, 1992.

CURRENT SITUATION

Despite the letters from Ireland, Taiwan, and Great Britain, large-scale driftnet fishing on the high seas is expected to continue until the U.N. deadline of June 30, 1992. Furthermore, recent violations of existing agreements by Taiwan and the Republic of Korea and the re-emergence of Chinese driftnet vessels in the North Pacific fishery, after an announcement by their government that large-scale driftnet fishing would be halted, has lead many to question whether the U.N. moratorium will really be fully implemented.

In fact, Japan, has confirmed those doubts, indicating that it intends to continue this practice after the U.N. deadline. On September 27, 1991, the government of Japan filed a position paper with the U.N. challenging the moratorium called for in Resolution No. 44-225. It claims that the scientific data does not support the driftnet ban and, therefore, according to the language in the Resolution, the moratorium should not be imposed.

In an effort to close this "loophole" in the language of Resolution No. 44-225, the U.S. introduced a new Resolution at the U.N. on October 9, 1991. Noting that evidence has not demonstrated that the unacceptable impacts of large-scale, pelagic driftnet fishing can be prevented, the New Resolution calls upon all nations to implement the moratorium on June 30, 1992, without exception.

Anticipating, and in response to, continued resistance to the moratorium, several members have introduced legislation in the 102nd Congress aimed at reinforcing Resolution No. 44-225 and halting large-scale driftnet fishing on the high seas. H.R. 2152 was one of those bills.

COMMITTEE ACTION

H.R. 2152, a bill to enhance the effectiveness of the United Nations international driftnet fishery conservation program, was in-

troduced by Mr. Studds, Mr. Young of Alaska, Mrs. Unsoeld, and 28 other original cosponsors, on April 30, 1991. The bill was referred to the Committee on Merchant Marine and Fisheries, and on May 3, 1991 the Committee referred the bill to the Subcommittee on Fisheries and Wildlife Conservation and the Environment.

AUGUST 6, 1991 HEARING

On August 6, 1991, the Subcommittee conducted a hearing in Seattle, Washington on H.R. 2152 and two other related bills: H.R. 2920, a bill to direct the Coast Guard and the Secretary of Defense to enter into an agreement under the Magnuson Fishery Conservation and Management Act authorizing the Coast Guard to utilize the resources of the Department of Defense to enforce large scale driftnet fishing regulations; and H.R. 2921, a bill to amend the Fishermen's Protective Act of 1967 to expand the President's embargo authority under the Pelly Amendment.

The Subcommittee heard testimony from two panels of witnesses. On the first panel were: Mr. David Colson, Deputy Assistant Secretary of Oceans and Fisheries Affairs in the U.S. Department of State; Captain Bernie Miller, Chief of Operations for the 17th District of the United States Coast Guard; and Rear Admiral Larry Marsh, Commander of the United States Naval Base in Seattle.

During his testimony, Mr. Colson explained that the Administration and the Congress were united in their goal of seeking to end the destructive and wasteful practice of large scale, driftnet fishing on the high seas. He stated that the Administration supports the U.N. ban and has seen no data that support the continuation of this fishing practice after June 30, 1992.

Captain Miller testified that the Coast Guard takes its job of monitoring and enforcement of high seas driftnet fleets, particularly in the North Pacific, very seriously. He explained that the Agency's enforcement of bilateral agreements with Japan, Taiwan, and Korea has minimized the probability of driftnet vessels intercepting salmon of North American origin. He also pointed out that because the area of the ocean that must be monitored is over one million square miles, the reconnaissance information received from the Navy facilitated their efforts.

Finally, Admiral Marsh testified that current force levels and projected reductions in the Department of Defense make it unlikely that U.S. military assets would be specifically available for enforcing driftnet agreements. However, Navy ships and DOD aircraft could monitor driftnet vessels on a non-to-interfere basis while pursuing their primary mission and could report identity and location of potential violators to the correct enforcement authorities. DOD recommended that the Navy work with the Coast Guard and the National Marine Fisheries Service to develop streamlined reporting procedures to facilitate enforcement.

The second panel consisted of: Mr. Donald Stuart, Executive Director of Salmon for Washington; Mr. John Iani, President of pacific Seafood Processors Association; Mr. Alan Reichman, Greenpeace U.S.A.; Mr. David Benton, Director of External and International Fisheries Affairs for the Alaska Department of Fish and Game; and Mr. Bill Robinson, Trout Unlimited.

All the members of the second panel expressed their unqualified opposition to the continued use of large-scale driftnets on the high seas and their support of the legislation before the Subcommittee. Both Mr. Iani and Mr. Benton testified specifically in support of mandatory sanctions being placed on fish and other products from countries that continue to engage in large-scale driftnet fishing, while Mr. Reichman suggested a denial of U.S. port privileges for driftnet vessels and their supply ships. Mr. Robinson suggested revocation of the "most favored nation" trade status for countries that do not comply with the U.N. moratorium.

SUBCOMMITTEE MARKUP

On September 26, 1991, the Subcommittee held a markup on H.R. 2152. Mr. Studds and Mr. Young offered an amendment in the nature of a substitute which differed significantly from the bill as introduced. The amendment was a compilation of several bills introduced in the 102nd Congress aimed at ending large-scale driftnet fishing, including H.R. 2152, H.R. 2920, H.R. 2921, and S. 884, passed by the Senate on August 1, 1991.

Specifically, the substitute amendment proposed to immediately deny foreign driftnet vessels access to U.S. ports, mandate sanctions on fish and fish products from countries that continue to engage in large-scale driftnet fishing after the U.N. deadline, and expand the Pelly Amendment to give the President new embargo authorities for other goods. Mrs. Unsoeld offered an amendment to the substitute, expanding the mandatory sanctions to include sport fishing equipment. Both Mrs. Unsoeld's amendment and the substitute were adopted by voice vote, and the Subcommittee ordered H.R. 2152, as amended, reported to the Full Committee.

FULL COMMITTEE MARKUP

The Full Committee met on Thursday, October 3, 1991, to consider H.R. 2152 as reported by the Subcommittee. Mr. Studds offered a series of en bloc amendments, on behalf of himself and Mr. Young, that made several changes to the bill. First, it deleted a provision that allowed for the detention of driftnet vessels, but maintained the denial of U.S. port privileges for such vessels. Second, it added a requirement that countries be notified if their vessels are going to be denied port privileges or their products are to face import embargoes. Finally, it changed the effective date of mandatory sanctions for fish products and sport fishing equipment from September 1, 1992, to July 1, 1992, linking the embargo directly to the U.N. driftnet moratorium deadline of June 30, 1992.

After a discussion in which several Members suggested that the bill should take even more restrictive measures against driftnet fishing nations, the amendment was adopted, as introduced, by voice vote.

Mr. Studds then offered another amendment on behalf of himself, Mr. Young, Mrs. Unsoeld, and Mrs. Lowey. Recognizing that U.S. trade negotiations should take environmental concerns into account, the amendment directs the President to take an active role in modifying the General Agreement on Tariffs and Trade

[GATT] to recognize and account for the domestic environmental laws and treaties of the Contracting Parties.

During discussion of the amendment many Members expressed concern that domestic fishermen and other industries are at a disadvantage because the U.S. imports products from countries that do not have environmental laws that are as restrictive as domestic laws. A few members suggested that the language should be strengthened to require nations wishing to sell imports in the U.S. to comply with U.S. environmental laws. After further discussion, the amendment was adopted, as introduced, by voice vote.

Mr. Taylor then offered an amendment to include shellfish under the mandatory sanctions provisions of the bill. This motion was also adopted by voice vote.

Mr. Studds obtained unanimous consent to strike all after the enacting clause and insert the text of the bill as amended to that point.

There being no further amendments, the Committee ordered H.R. 2152, as amended, reported to the House of Representatives by voice vote.

Section-by-Section Analysis

TITLE I

Section 101. Denial of port privileges and sanctions for high seas large-scale driftnet fishing

Subsection (a) directs the Secretary of Commerce, in consultation with the Secretary of State, to publish a list of those countries whose nationals are known to be using large-scale driftnets on the high seas. The Secretary must publish that list within ten days after the date of enactment of this Act, and update that list periodically. This subsection directs the Secretary of the Treasury to deny the entry of a driftnet vessel into any U.S. port or U.S. navigable waters, if that vessel is registered in a country that is included on the published list.

Paragraph (a)(3) directs the Secretary of State to notify each country that is included on the published list that their driftnet vessels will be denied port privileges and of any further sanctions that may be levied against that country if their vessels continue to engage in large-scale driftnet fishing after the July 1, 1992 deadline.

Subsection (b) directs the Secretary of Commerce to identify each nation that continues to engage in large-scale driftnet fishing on the high seas after July 1, 1992. The Secretary is also to notify the President and each country of this identification. The President shall direct the Secretary of the Treasury to immediately prohibit imports of certain goods from each of those countries identified. Those goods shall include shellfish, fish and fish products, and sport fishing equipment. Within fifteen days, the President shall report to the Secretary of Commerce and the Congress the actions taken.

Paragraph (b)(3) requires the Secretary of Commerce to certify to the President, any country (after six months from the identification) that has not terminated large-scale driftnet fishing on the high seas, or has retaliated against the U.S. This certification is deemed to be a certification under section 8(a) of the Fisherman's Protective Act as amended by this Act.

Section 102. Duration of denial of port privileges and sanctions

This section mandates that any sanctions levied against a country will remain in effect until the Secretary certifies to the President and the Congress that the country affected has terminated the use of large-scale driftnets on the high seas.

Section 103. Definitions

This section defines the terms used in the first title of this Act. These include the definitions for "fish and fish products", "large-scale driftnet fishing", and "large-scale driftnet fishing vessel".

TITLE II

Section 201. Import restrictions under the Fisherman's Protective Act of 1967

This section amends the Fisherman's Protective Act of 1967 (22 U.S.C. 1978) to expand the current discretionary powers of the President under this Act. These powers include the ability to levy import sanctions on any product against a country which is conducting fishery practices or engages in trade which diminishes the effectiveness of international programs for fishery conservation or programs for endangered or threatened species. The Fisherman's Protective Act currently identifies only fish and wildlife products as products which may be embargoed under this Act. Additionally, this section amends the definition of "United States", "International fishery conservation program", and "taking" to conform with current definitions.

Section 202. Memorandum of Understanding

This section directs the Secretaries of Commerce, Defense, and the department in which the Coast Guard is operating to enter into a Memorandum Of Understanding (MOU). The purpose of this MOU is to use the resources available in these departments for enforcement of domestic laws and international agreements pertaining to the conservation and management of living marine resources. This agreement shall include procedures for the identification and location of vessels violating these laws and agreements. Additionally, this agreement shall include procedures for the use by enforcement agents of information gathered by surveillance resources of the Department of Defense.

Section 203. Environmental Trade Negotiations

This section establishes Congressional policy as it relates to the role of environmental issues in international trade negotiations.

Subsection (a) declares it to be the policy of Congress that environmental issues should be addressed during all international trade negotiations. The Committee notes that international trade has a major influence on patterns of resource use and related environmental impacts, yet these issues are not always addressed during trade negotiations.

Subsection (b)(1) directs the President, acting through the office of the United States Trade Representative, to pursue changes to the General Agreement on Tariffs and Trade (GATT) that would result in consideration of, and conformation to, the domestic environmental laws of the Contracting Parties to the GATT. Multilateral, bilateral, and regional environmental treaties between or among Contracting Parties should also be taken into consideration. As the GATT currently contains no reference to the environment, the Committee notes that these changes would require reforming or adding to the Articles of the GATT. It is the intent of the Committee that "consideration" of domestic environmental laws does not mean ignoring those laws. The Committee is concerned that statutes which use trade sanctions to support sound environmental policies have been interpreted by the Executive branch in such a way as to undermine the intent of Congress. The Committee expects the United States Trade Representative to make every effort to amend the GATT to allow trade sanctions to be used in support of sound and rational environmental policies.

Subsection (b)(2) directs the President to seek to secure a working party on trade and the environment within the GATT as soon as possible. This working party should be convened with a broad mandate to consider the environmental ramifications of existing GATT policy. The working party should also establish procedures to include environmental issues in ongoing and future GATT negotiations.

Subsection (b)(3) directs the President to take an active role in developing national and global trade policies which make the GATT more responsive to environmental concerns. The Committee notes that costs associated with the production of goods under strict national environmental protection laws have the potential to impose a competitive disadvantage on domestic products from that nation in comparison to imports from nations that have less strict environmental laws. Contracting Parties should be able to take actions domestically to preserve natural resources without fear of GATT retaliation. The President should therefore pursue a GATT solution to trade disadvantages associated with the costs of national environmental protection that is consistent with U.S. environmental laws.

Subsection (b)(4) directs the President to involve federal agencies with environmental expertise in all trade negotiations. These agencies should determine whether and to what extent trade negotiations will affect domestic environmental law, and advise the U.S. Trade Representative accordingly. Agencies should include, but not be limited to, the Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration.

Subsection (b)(5) reflects the Committee's concern over the general lack of access to the trade negotiation process. It therefore directs the President to consult with the Congress and other interested parties on a regular basis during negotiations. Such interested parties should include industry groups affected by the negotiations, States, and non-governmental organizations.

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UNITED STATES INTERNATIONAL DRIFTNET FISHERY CONSERVATION PROGRAM

FEBRUARY 19, 1992.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ROSTENKOWSKI, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H.R. 2152]

[Including cost estimate of the Congressional Budget Office]

The Committee on Ways and Means, to whom was referred the bill (H.R. 2152) to enhance the effectiveness of the United Nations international driftnet fishery conservation program, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

For the amendments made by this committee, see copy of the reported bill.

BACKGROUND AND SUMMARY

The purpose of H.R. 2152 is to enhance the effectiveness of United Nations Resolution Number 46-215 and to bring an end to the practice of large-scale driftnet fishing on the high seas. H.R. 2152 would do so by broadening the import sanctions applicable under U.S. law to countries whose nationals or vessels engage in large-scale driftnet fishing on the high seas on or after December 31, 1992.

Large-scale driftnet fishing is a method of fishing in which a gillnet composed of a panel or panels of webbing, with a total length of one and one half miles or more, is placed in the water and allowed to drift with the currents and winds. These nets, which are usually made of nearly invisible monofilament line, entangle virtually everything that comes in contact with them. Often fished in lengths exceeding 30 miles, large-scale driftnets are distinguished by their method of harvest, indiscriminately killing not only non-targeted fish, but dolphins, whales, turtles and seabirds.

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The fishery of greatest concern today is the large-scale driftnet fishery in the North Pacific Ocean which became commercially important in the mid-1970's and contined to grow until the late 1980's. Fishermen from Japan, Taiwan and the Republic of Korea used large-scale dirftnets to target various species of salmon, squid, and tuna. This buildup of the foreign driftnet fleets on the high seas led to a commensurate increase in the mortality of seabirds, marine mammals, and U.S. origin salmon. At the height of the high seas large-scale driftnet fishery in the late 1980's over 800 foreign vessels were fishing in the North Pacific Ocean. In addition to the devastating effects this fishery was having on the returns of U.S. salmon and steelhead to native streams, National Marine Fisheries Service scientists estimated that tens of thousands of marine mammals were taken in the 50,000 net retrievals each year.

Since the mid-1980's number of domestic and international initiatives have been taken with the objective of eliminating these driftnet fishing operations. Domestically, the Congress passed in 1987 the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (Public Law 100-20). The Act was intended to monitor assess, and reduce the adverse impacts of large-scale driftnets. As a result of this 1987 Act, agreements were negotiated with Japan, Taiwan, and the Republic of Korea, which were to terminate on June 30, 1992, when a U.N. moratorium on driftnet fishing was originally slated to enter into force. In July 1991, both Taiwan and Korea were found to be in violation of these agreements and were certified as such by the Secretary of Commerce under section 8(a) of the Fishermen's Protective Act of 1967.

The Congress also passed several amendments pertaining to driftnets in the 1991 amendments to the Magnuson Fishery Conservation and Management Act. Under these amendments, there is a prohibition on the importation of fish or fish products caught with large-scale driftnets in the South Pacific and tuna caught with driftnets on the high seas after July 1, 1991, and a prohibition on the importation of any fish or fish products caught with large-scale driftnets anywhere on the high seas after July 1, 1992.

Internationally, more than 20 South Pacific nations, the United States and France agreed in November 1989 to the Convention for the Prohibition of Fishing with Long Drift-nets in the South Pacific, also known as the Wellington Convention. The Wellington Convention set July 1, 1991, as the date for the cessation of large-scale driftnet fishing operations in the South Pacific. As a result of this convention, virtually all large-scale driftnet fishing has ceased in the South Pacific Ocean.

In addition, the United Nations General Assembly has adopted two recent resolutions concerning driftnet fishing. The first such resolution, U.N. Resolution No. 44-225, was adopted on December 29, 1989, and recommended that all countries cease large-scale driftnet fishing on the high seas by June 30, 1992. However, this resolution also contained certain language that could have been used by countries to justify the continuation of such fishing and several countries had indeed indicated their intent to do so. To close the loophole, the United States sought and achieved adoption on December 20, 1991, of U.N. Resolution No. 46-215, which recommends that countries cease, without exception, large-scale driftnet fishing on the high seas by December 31, 1992. All countries have now indicated that they intend to comply with the new resolution, although France, for technical reasons, has been given an additional year to comply under an EC regulation implementing the new U.N. resolution.

H.R. 2152, as amended, seeks to enhance the effectiveness of U.N. Resolution No. 46-215 and to bring an end to the use of large-scale driftnet fishing on the high seas by broadening the import sanctions applicable under U.S. law to countries whose nationals or vessels continue to engage in such fishing on or after December 31, 1992.

Committee Action

H.R. 2152 was reported with amendments on October 22, 1991, by the Committee on Merchant Marine and Fisheries. The bill was sequentially referred to the Committee on Ways and Means for a period ending not later than February 28, 1992. It should be noted that H.R. 2152 was reported by the Committee on Merchant Marine and Fisheries before the adoption of U.N. Resolution No. 46-215 on December 20, 1991. Thus, some of the effective dates contained in H.R. 2152 as reported by the Committee on Merchant Marine and Fisheries became inappropriate since they had been keyed to dates in the earlier U.N. Resolution No. 44-215.

The Committee on Ways and Means held a mark-up of H.R. 2152 on February 12, 1992, and, by voice vote, ordered H.R. 2152 favorably reported, with amendments.

Section-by-Section Analysis, Comparison With Present Law, and Justification of Those Provisions Within the Jurisdiction of the Committee on Ways and Means

TITLE I—HIGH SEAS LARGE-SCALE DRIFTNET FISHING

SECTION 101(b). SANCTIONS.

Present law

The 1991 amendments to the Magnuson Fishery Conservation and Management Act prohibit the importation of fish or fish products caught with large-scale driftnets in the South Pacific and tuna caught with driftnets on the high seas after July 1, 1991, and prohibit the importation of any fish or fish products caught with large-scale driftnets anywhere on the high seas after July 1, 1991.

Explanation of provision

In general, section 101(b) expands the import sanctions applicable to countries whose nationals or vessels engage in driftnet fishing on the high seas on or after December 31, 1992, and sets forth the procedures to be followed in applying those import sanctions. As amended by the Committee, the effective date of the provision is compatible with U.N. Resolution 46-215, and the procedures set forth therein provide more flexibility to the Administration in insuring compliance by our trading partners with such resolution.

Subsection (b)(1) requires the Secretary of Commerce not later than December 31, 1992, to identify each country the nationals or vessels of which conduct large-scale driftnet fishing beyond the exclusive economic zone of any country and to notify the President and that country of the identification. At any time after December 31, 1992, that the Secretary of Commerce has reason to believe that the nationals or vessels of any country are conducting large-scale driftnet fishing beyond the exclusive economic zone of any country, the Secretary shall identify that country and notify the President and that country of the identification.

Subsection (b)(2) requires the President to enter into consultations with respect to any country identified after December 31, 1991, within thirty days after the identification. The purpose of these consultations is to obtain an agreement that will effect the immediate termination of large-scale driftnet fishing by the nationals or vessels of that country beyond the exclusive economic zone of any country. It is the Committee's understanding that immediate termination does not necessarily mean instantaneous, although the termination should be achieved within a matter of no more than several weeks if any phase-down period is justified by the particular circumstances of a case.

Subsection (b)(3) requires the President to direct the Secretary of the Treasury to prohibit the importation of shellfish, fish and fish products, and sport fishing equipment from any country that has been identified by the Secretary of Commerce under subsection (b)(1) and, in the case of countries identified after December 31, 1991, with which consultations have not been satisfactorily concluded within 90 days. The Secretary of the Treasury shall implement any prohibition not later than 30 days after receiving direction from the President and shall provide public notice of the impending prohibition.

Subsection (b)(4) requires the Secretary of Commerce to certify to the President any country (after six months from the identification) that has not terminated large-scale driftnet fishing on the high seas, or has retaliated against the United States. This certification is deemed to be a certification under section 8(a) of the Fisherman's Protective Act as amended by this Act. This would make additional import sanctions available for the President to use on a discretionary basis if he deemed it appropriate.

Reasons for change

The Committee strongly supports recently adopted U.N. Resolution No. 46-215 banning the use of large-scale driftnet fishing on the high seas. The Committee is encouraged that there is unanimity among all nations to comply with this ban as of December 31, 1992. At the same time, the Committee believes that, since the U.N. resolution does not include any enforcement mechanism, it is appropriate to provide for effective enforcement of the resolution under U.S. law through the use of a combination of mandatory and discretionary import sanctions. The bill as reported by the Committee provides for such sanctions and their use in such a way that attempts to reflect recent developments at the international negotiating table as well as customary procedures in U.S. trade laws for imposing import sanctions. In this regard, the Committee amended

the bill as reported by the Committee on Merchant Marine and Fisheries to provide the President some flexibility procedurally for dealing with the unlikely situation that a country may be in violation of the U.N. moratorium after December 31, 1992. For example, a country may find that pirate fishing vessels under its flag have resumed using large-scale driftnets and a short period of time is required for the United States and the country in question to agree on how best to effect the immediate termination of the practice so that the country can avoid having U.S. mandatory import sanctions imposed against it.

SECTION 103(2). DEFINITION OF LARGE-SCALE DRIFTNET FISHING.

Present law

No provision.

Explanation of provision

The committee adopted an amendment to the definition of large-scale driftnet fishing as contained in the bill as reported by the Committee on Merchant Marine and Fisheries which creates an exception until January 1, 1994, for the use in the northeast Atlantic Ocean of gillnets with a total length not to exceed 5 kilometers if the use is in accordance with regulations adopted by the European Community pursuant to the October 28, 1991, decision by the Council of Fisheries Ministers of the Community.

Reasons for change

The Committee agreed that this exception was appropriate to avoid having mandatory sanctions go into effect against a country of the European Communities that had indicated it required an additional year to comply with U.N. Resolution No. 46-215 and was granted this additional time by the implementing regulation of the Communities.

TITLE II—FISHERIES CONSERVATION PROGRAMS

SECTION 201. IMPORT RESTRICTIONS UNDER THE FISHERMAN'S PROTECTIVE ACT OF 1967.

Present law

Under the Fisherman's Protective Act of 1967 (22 U.S.C. 1978), the President has the discretionary authority to impose import sanctions on any fish and wildlife products from any country which conducts fishery practices or engages in trade which diminishes the effectiveness of international programs for fishery conservation or programs for endangered or threatened species.

Explanation of provision

This section amends section 8 of the Fisherman's Protective Act of 1967 to expand the current discretionary powers of the President under the Act to include the ability to impose import sanctions on any product against an offending country.

Reasons for change

The Committee believes that an expansion of the discretionary authorities of the President under the Fisherman's Protective Act of 1967 will give him additional statutory tools to carry out more effectively the objectives of the Act.

SECTION 203. TRADE NEGOTIATIONS AND THE ENVIRONMENT.

Present law

No provision.

Explanation of provision

As amended by the Committee, section 203 states the sense of the Congress that the President, in the carrying out of multilaterial, bilateral, and regional trade negotiations, should seek to address environmental issues relating to the negotiations; reform the GATT to reflect contracting parties' environmental laws and international treaties; to secure a GATT working party on trade and the environment; to work to make GATT more responsive to national and international environmental concerns; to include other federal agencies with environmental expertise in trade negotiations; and to consult with interested parties concerning progress in the negotiations.

Reasons for change

The Committee believes that there is a growing need to coordinate U.S. policy in the trade area with U.S. policy in the environmental area and vice versa. At the same time, the Committee believes that further study and analysis on how best to accomplish this policy coordination is warranted before the Congress legislates on U.S. negotiating objectives in this field. In light of the above, the Committee believes that a sense of Congress resolution addressing this matter is the most appropriate means of expressing its views at this time.

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MARINE MAMMAL HEALTH AND STRANDING RESPONSE ACT

JULY 30, 1992.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. JONES of North Carolina, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H.R. 3486]

[Including Cost Estimate of the Congressional Budget Office]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 3486) to amend the Marine Mammal Protection Act of 1972 to provide for examination of the health of marine mammal populations and for effective coordinated response to strandings and catastrophic events involving marine mammals, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Marine Mammal Health and Stranding Response Act".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) Current stranding network participants have performed an undeniably valuable and ceaseless job of responding to marine mammal strandings over the last 15 years.

(2) Insufficient understanding of the connection between marine mammal health and the physical, chemical, and biological parameters of their environment prevents an adequate understanding of the causes of marine mammal unusual mortality events.

(3) An accurate assessment of marine mammal health, health trends in marine mammal populations in the wild, and causes of marine mammal unusual mortality events cannot be made without adequate reference data on marine mammals and the environment in which they live.

(4) A systematic assessment of the sources, presence, levels, and effects of potentially harmful contaminants on marine mammals would provide a better understanding of some of the causes of marine mammal unusual mortality events

59-006

Purpose of the Bill

The purpose of H.R. 3486 is to amend the Marine Mammal Protection Act of 1972 to provide for examination of the health of marine mammal populations and for effective, coordinated responses to unusual mortality events involving marine mammals.

Background and Need For Legislation

Marine mammals beach and strand themselves regularly along the shores and within the waters of the United States. Since the passage of the Marine Mammal Protection Act (MMPA) in 1972, efforts have been made nationwide to assist stranded marine mammals. These efforts have been conducted largely by stranding network participants, who, under section 112(c) of the MMPA, hold Letters of Agreement (LOAs) from the National Marine Fisheries Service (MNFS). These LOAs authorize participants to engage in stranding-related activities. Stranding network participants work primarily on a volunteer basis, and include both non-profit and for-profit organizations and institutions. Among the general goals of the stranding network are to derive maximum educational and scientific benefits from stranded marine mammals, which may lead to an improved ability to determine the causes of marine mammal strandings.

STRANDING NETWORK PARTICIPANTS

Federal responsibility for marine mammals resides in both the Department of Commerce (DOC) and the Department of the Interior (DOI). DOI is responsible for sea otters, manatees, walruses, and polar bears, while DOC is responsible for all other marine mammals, including whales, dolphins, seals, and sea lions. Both agencies

rely heavily on a volunteer network for responding to individual beachings or stranding events.

Stranding network participants are charged with the care and custody of marine mammals, which includes rescue, rehabilitation, and return to the wild or, if warranted, relocation or euthanasia of beached or stranded marine mammals. These efforts are financed through private and corporate donations and grants, without federal assistance. The response of stranding network participants to day-to-day stranding events has been extraordinary, considering many operate under funding constraints and with only volunteer help. Stranding network participants report on a monthly basis to the appropriate Regional NMFS office on the marine mammals that have been or are presently in their care. The information is then sent from the Regional NMFS Offices to the National NMFS Office of Protected Resources in Silver Spring, Maryland.

It is unlawful, under the MMP, for any person to "take" a marine mammal (i.e., harass, hunt, capture, or kill or attempt to harass, hunt, capture, or kill any marine mammal) without federal authorization. Because rescuing a stranded marine mammal is considered a "take", stranding network participants are given authority to do so under sections 112(c) and 109(h)(1) of the MMPA.

Although H.R. 3486 will not provide direct financial assistance for day-to-day operations within the stranding network, it will offer indirect assistance. The Secretary will be required to gather and compile information on the rescue and rehabilitation of marine mammals, and to develop objective criteria for determining the point at which a rehabilitated marine mammal can be returned to the wild. H.R. 3486 also requires the Secretary, through the Office of Protected Resources, to produce guidelines for the collection, preservation, labeling, transport, and quality-controlled archiving of marine mammal tissue samples in the National Marine Mammal Tissue Bank. These guidelines will also be made available as guidance for day-to-day collections by stranding network participants who wish to use them. The Secretary will provide access to the NMFS information data base for investigations into marine mammal health and population trends, and for relating of those stranding network participants who request it.

MARINE MAMMAL UNUSUAL MORTALITY EVENTS

Three specific events triggered the need for this legislation—the stranding of 14 humpback whales off Cape Cod in 1987, the bottlenose dolphin die-off along the Atlantic seaboard in 1987-88, and the EXXON VALDEZ oil spill in Prince William Sound in 1989. These unusual mortality events (unexpected marine mammal stranding events that cause significant die-offs of marine mammal populations and require immediate responses) demonstrated that existing law did not provide for effective, coordinated responses to catastrophes of this nature. H.R. 3486 recognizes that to overcome mismanagement and uncoordinated response to these unusual mortality events, pre-planning, consistent training, and a known chain of command are necessary.

H.R. 3486 requires the Secretary to establish an unusual mortality event working group that will—

(1) Determine when an unusual mortality event is occurring;

(2) Determine the point at which an usual mortality event is concluded;

(3) Develop a contingency plan which allows for a coordinated response to an event; and

(4) Identify individuals or organizations that can assist the Secretary in a coordinated and effectiveness response.

The contingency plan will maximize our chances for identifying causes of unusual mortality events and their effects on marine mammal populations. Also, the roles played by physical, chemical and biological factors hopefully will be elucidated.

H.R. 3486 authorizes the Secretary, in consultation with the Secretary of the Interior, at the start of any marine mammal unusual mortality event, to choose an Onsite Coordinator, who will be responsible for directing and managing the appropriate response to that particular event.

MARINE MAMMAL TISSUE BANK AND TISSUE ANALYSIS

Strandings and unusual mortality events can be used as learning tools to diagnose the health of marine mammal populations. If a marine mammal is still live or freshly dead, tissues can be collected for analysis, the results of which may lead to an explanation of what caused the marine mammal to strand. During the more than 15 years the stranding networks have been operating, tissues have been collected, but methods of tissue collection, preparation, storage, and examination have been variable and not standardized.

H.R. 3486 will coordinate existing facilities for the archiving of marine mammal tissues into a National Marine Mammal Tissue Bank. NMFS, in consultation with the marine mammal scientists, will issue recommended guidelines for collection, preparation and archiving of tissues, as well as recommended, best-available, tissue analysis techniques. Thus, information from one event will be comparable to information from another event, and all these will be able to be referenced to standard samples taken from non-stranded marine mammals in the wild. Sources of these samples will be marine mammals caught accidentically in fishing operations, taken by native fishermen under special subsistence permits, or sampled from live marine mammals in the wild and achieved in the National Marine Mammal Tissue Bank.

Of all the provisions in H.R. 3486, it is anticipated that archived tissue samples and standardized, quality-controlled tissue analyses will provide the most insightful evidence for determining why marine mammals strand, how unusual mortality events occur, and when these events are detrimental to marine mammal populations.

COMMITTEE ACTION

H.R. 3486 was introduced on October 3, 1991, by Mr. Carper, Mr. Saxton, Mr. Jones, Mr. Studds, and others.

The Subcommittee on Fisheries and Wildlife Conservation and the Environment met on June 25, 1992 to consider H.R. 3486. At that time Mr. Carper, Mr. Saxton, and Mr. Studds offered an amendment in the nature of a substitute, which clarified the process by which the Secretary gathers and compiles information and

specified the protocol the Secretary is required to follow during a marine mammal unusual mortality event. The bill, as amended, was ordered reported to the Full Committee by voice vote.

The Full Committee met on July 1, 1992, to consider the bill. Mr. Saxton and Mr. Carper offered an en bloc amendment that addressed two issues: (1) development and implementation by the Secretary of objective criteria for determining at what point a rehabilitated marine mammal can be returned to the wild; and (2) liability.

The Committee approved this en bloc amendment by voice vote, and ordered H.R. 3486 reported to the House of Representatives.

Section-by-Section Analysis

SECTION 1. SHORT TITLE

The short title is the "Marine Mammal Health and Stranding Response Act".

SECTION 2. FINDINGS

Section 2 sets forth eight Congressional findings regarding the lack of effective programs for assessing the health of marine mammals in the wild, and for responding to marine mammal strandings, including unusual mortality events (i.e. die-offs).

SECTION 3. MARINE MAMMAL HEALTH AND STRANDING RESPONSE PROGRAM

Section 3(a) adds a new Title III to the Marine Mammal Protection Act, creating the Marine Mammal Health and Stranding Response Program. The new title is divided into the following subsections:

Section 301. Establishment of program

Section 301(a) would require the Secretary of Commerce ("the Secretary") to establish the Marine Mammal Health and Stranding Response Program.

The Secretary will have full administrative and operational responsibility for ensuring that the procedures in this title are followed. However, the Committee does not intend for the Secretary to exclude the Secretary of the Interior from the process of being consulted regularly during an unusual mortality event, if that event should involve a marine mammal under the jurisdiction of the Department of the Interior. In addition, the Committee expects that this program will focus not only on cetaceans (whales and dolphins), but equally on pinnipeds (seals, sea lions, walruses), sea otters, manatees, and polar bears.

Subsection (b) states that the purposes of the program are to—(1) facilitate collection and dissemination of reference data on marine mammals; (2) correlate the health of marine mammals in the wild with available data on physical, chemical, and biological parameters; and (3) coordinate effective responses to marine mammal unusual mortality events by establishing a process within the Department of Commerce to do so.

By "reference data" the Committee means data, such as biotoxin, pollutant, and contaminant tissue levels, from which comparisons

can be made. Such comparisons will help determine if trends observed are either normal fluctuations and ranges or statistically significant changes over time within the biological system being examined.

Throughout this title, the phrase "in the wild" is used to ensure that nothing in this title is meant to regulate any species of marine mammals currently held in captivity at aquaria, zoos, or other facilities in the United States.

The Committee expects the Secretary to actively seek out and consult with other agencies to compile information on "physical, chemical, or biological parameters". Examples include: water sampling results from the Environmental Protection Agency (EPA); microbiological testing from the Centers for Disease Control; oil viscosity and composition testing by the Coast Guard; weather data from the National Oceanic and Atmospheric Administration (NOAA); and habitat degradation, human disturbance, or food availability data from the Fish and Wildlife Service, all of which could have been documented at or near the same time or location as a marine mammal unusual mortality event. The Committee also intends for the Office to gather existing data from programs such as EPA's Environmental Monitoring and Assessment Program and NOAA's Status and Trends Program.

The Committee does not intend that the National Marine Fisheries Service or the U.S. Fish and Wildlife Service will actually conduct any programs of marine environmental research, but rather they will gather information already being collected from other appropriate government and private entities and correlate that information with marine stranding events.

Section 302. Determination, data collection, and dissemination

Section 302(a) directs the Secretary to, within 24 months of enactment, develop and implement objective criteria, on a species-by-species basis, for determining at what point a marine mammal that has been rescued and rehabilitated is returnable to the wild.

Historically, for the past 15 years stranding network participants have been rescuing and rehabilitating marine mammals. Details on how to rescue and rehabilitate marine mammals have grown out of trial, error, and experience. Criteria for determining at what point these rehabilitated marine mammals are either ready to be returned to the wild, or if not releasable, ready to be moved to a permanent display or academic facility, has traditionally fallen within the purview of the stranding network participant in consultation with veterinarians and animal care committees. This Title will expedite that process by requiring that NMFS gather the rescue, rehabilitation, and release criteria being used by individual field institutions and compile them into usable objective criteria for standardized use. The Committee expects that the criteria developed and implemented by the Secretary will allow relative leeway for veterinary best judgment decisions.

In order to develop the criteria as required by section 302(a), subsection (b) requires that the Secretary and the Secretary of the Interior gather, compile, and periodically update, existing information on procedures and practices for rescuing, rehabilitating, and returning stranded marine mammals to the wild. Additionally, the

Secretary is directed to collect and catalog appropriate scientific literature and information on marine mammal health, disease, rehabilitation, strandings, life history, and reference level data.

The Committee intends that the majority of the "life history and reference level data" will come out of library collections located at the Marine Mammal Commission, the National Marine Mammal Laboratory Library, and the Smithsonian Institution. In addition, the Committee expects that NMFS will contact the Food and Agriculture Organization of the United Nations and gather whatever information they might have available within their United Nations Environmental Program Regional Seas Bibliography.

Subsection (c) directs the Secretary to make all information collected under section 302 available for stranding network participants and other qualified scientists to utilize while conducting studies on marine mammal health, disease, and strandings.

Section 303. Stranding response agreements

Section 303(a) concerns Letters of Agreement (LOAs) under sections *112(c) and 109(h)(1) of the Marine Mammal Protection Act*, which the Secretary is required to enter into in order for a marine mammal to be rescued ("taken") during a stranding or unusual mortality event.

Subsection (b) requires that the LOAs contain, at a minimum, the name of the person (i.e. stranding network participant performing rescue and rehabilitation) who is authorized to take marine mammals, and specific terms and conditions for responding, reporting, and delegating authority to another person. The Committee anticipates that LOAs will be standardized nationwide.

Subsection (c) requires the Secretary to periodically update these LOAs for performance adequacy and effectiveness. Depending on the facility's history, the length of time the facility has been in existence, and the degree of veterinary medical expertise within the facility, the Secretary may choose to review that facility more or less often for performance adequacy and effectiveness. The Committee expects that those facilities for which complaints exist will be reviewed more frequently.

Inherent in this section is the Committee's intent that persons not authorized by LOAs may not legally respond to a stranding or unusual mortality event without first entering into such an agreement with the Secretary or acting under an already authorized stranding network participant's LOA.

Section 304. Unusual mortality event response

Section 304(a) requires the Secretary, in consultation with the Secretary of the Interior, to establish a marine mammal unusual mortality event working group, consisting of individuals with knowledge and experience in marine science marine mammal science, marine mammal veterinary and husbandry practices, marine conservation, and medical science, to provide guidance to the Secretary. The working group will help the Secretary:

(i) Determine whether an unusual mortality event is occurring;

(ii) Determine, once a response has begun, when that particular response to an unusual mortality event should be concluded; and

(iii) Develop a contingency plan to assist the Secretary in responding to unusual mortality events.

The unusual mortality event working group will also be responsible for determining if an unusual mortality event is occurring, defined as an unexpected, "significant" die-off of any marine mammal population that demands immediate response. There is the potential if an area is very remote or if a very rare species of marine is involved that only one or a few animals will be considered "significant"; this will be determined by the working group based on the best professional judgment of its members.

Subsection (a)(1)(B) states that the Federal Advisory Committee Act (FACA) will not apply to the marine mammal unusual mortality event working group. FACA is waived for two reasons:

(1) To allow the Secretary to work with the unusual mortality event working group, particularly when immediate action is required; and

(2) To allow the working group to be a continuum, not subject to reappointment on a two-year basis and not subject to the filing of annual reports. The Committee does expect that minutes will be kept of all formal meetings of the working group.

Subsection (a)(2) requires specific times within which the Secretary must respond to an unusual mortality event. In general, the Secretary must contact as many working group members as possible within 24 hours of notification by a stranding network participant that an unusual mortality event may be occurring. The Secretary must also determine the need for and designate an Onsite Coordinator within 48 hours, if the Secretary determines that an unusual event is occurring.

By employing the phrase "to the extent necessary and practicable", the Committee intends that the Secretary shall, within 24 hours of a suspected unusual mortality event, contact as many working group members as possible to query their opinions on whether an unusual mortality event is occurring. For instance, if there is a potential bacterial or viral problem, the Secretary and the working group may wish to gather additional information on numbers, species, sexes, ages, and specific conditions of those animals that might be stranding to aid in their assessment of whether an unusual mortality event is occurring. They have leeway to do this, using what the Committee assumes will be their own best judgments based on past experience. The Committee recognizes the fact that emergency situations may require a degree of flexibility in the process.

For the majority of potential unusual mortality events, however, the Committee expects the Secretary to contact the unusual mortality event working group within 24 hours of being contacted by a local stranding network participant, and, with its guidance, decide whether an event is or is not occurring within 48 hours.

If the Secretary determines that an unusual mortality event is occurring, then the Secretary must within that same 48 hours, and in consultation with the Secretary of the Interior, if appropriate,

designate an Onsite Coordinator. The Onsite Coordinator shall immediately make recommendations to the stranding network participant on how to proceed, whether by following a contingency plan (as detailed below) or (if no contingency plan exists or if the existing contingency plan is inappropriate for the situation), by following the best professional judgment of the Onsite Coordinator in responding to the unusual mortality event.

Subsection (b) details the contents of a contingency plan. The contingency plan will, at a minimum: (1) contain a list of persons, including stranding network participants, and persons at all levels (local, state, and national), who can assist the Secretary in implementing a coordinated and effective plan; (2) describe the types of tissues and tissue analyses necessary to assist in diagnosing causes of unusual mortality events; (3) establish procedures for training, mobilizing, and using available personnel, facilities, and other resources; (4) ensure rapid and effective response to emergencies and unusual mortality events; and (5) minimize death of marine mammals in the wild and provide appropriate care for marine mammals during an unusual mortality event. It is also the intention of the Committee that, in developing the "detailed" contingency plan, the specific rescue and rehabilitation techniques of individual species, as well as the potential geographical ranges of those species, will be addressed. As examples, the contingency plan should address the differences in care and handling between sea otters, polar bears, and fur seals, while alternatively, it might combine the responses to certain coastal small cetaceans or deep-diving seals together in family groupings.

The contingency plan should pinpoint centers of scientific knowledge (for example, centers with skills in pathology, microbiology, parasitology, toxicology, immunology, endocrinology, epidemiology, and ecology) to call on during unusual mortality events, and which will assist with response implementation and maximization of data utilization.

The contingency plan is meant to assist in determining the causes of an unusual mortality event, the effects any particular event may have on marine mammal populations that are affected by the event, and identify influencing roles, if any, that physical, chemical, and/or biological factors may have, including any potential roles played by pollutants or contaminants.

By "physical, chemical, and biological factors" the Committee means those situations, such as geophysical catastrophes, chemical spills, pollutant or contaminant discharges, biotoxins, microbial or parasite infestations, and any other unspecified emergencies affecting marine mammals in the wild.

The contingency plan or other response to an unusual mortality event should not invalidate any existing permits for scientific research or public display. During a recent Gulf of Mexico die-off, the public display community instituted a voluntary moratorium on taking marine mammals for display. The Committee expects that the community will voluntarily continue such practices.

Subsection (c) discusses designation and duties of the Onsite Coordinator. The Onsite Coordinator is designated by the Secretary in consultation, when appropriate, with the Secretary of the Interior. If more than one species is involved, if species from both Commerce's and Interior's purview are involved, if the numbers of animals involved is large, or if the range of the event is wide, more than one Onsite Coordinator may be designated. If more than one Onsite Coordinator is designated, however, one of them will be selected by the Secretary to be the primary Onsite Coordinator.

The Onsite Coordinator will be designated within the same timeframe as the appropriate stranding network participant is informed that an unusual mortality event is indeed occurring. The Onsite Coordinator will be chosen from appropriate personnel of the Regional Offices of either the National Marine Fisheries Service or the U.S. Fish and Wildlife Service. The Committee anticipates that the choice of Regional Director or his/her designee will be based either on the location of the event or the marine mammal expertise of the individual so designated. The Onsite Coordinator will manage personnel and facility usage, act as a liaison between the local stranding network participants and the Office, and coordinate public relations. The Onsite Coordinator will also direct the response process under the contingency plan, or, if the contingency plan is incomplete, inadequate, or not applicable to the situation at hand, will use his/her best professional judgment. The Onsite Coordinator may, in the case of an emergency or unique situation, temporarily modify the existing contingency plan using his/her own best judgment. In the event that a modification is necessary, the Onsite Coordinator must consult as expeditiously as possible with the Secretary regarding the reasons for the change, and allow the Secretary, consulting with the unusual mortality event working group, to advise on any additional response procedure changes. The phrase "as expeditiously as possible" is meant to give the Onsite Coordinator a small amount of leeway in the event of an emergency.

The Committee does not intend that the authority conveyed by this Act will, in any way, supercede, modify, or limit the duties, and responsibilities of any person under the Oil Pollution Act of 1990 or the Comprehensive Environmental Response, Compensation, and Liability Act.

Section 305. Unusual mortality event activity funding

Section 305(a) establishes a "Marine Mammal Unusual Mortality Event Fund".

Subsection (b) establishes uses for the Fund. The Fund is to be made available only to the Secretary and only for responding to unusual mortality events. However, the Committee intends that the Secretary will consult with the Secretary of the Interior if species under the jurisdiction of the DOI are the marine mammals primarily involved in the unusual mortality event. The Secretary of Commerce will, if that is the case, act administratively and deliver the funds required by the Secretary of the Interior for responding to that particular unusual mortality event. Monies from the Fund will be available to compensate "special costs" incurred in responding to these events and costs of preparing and transporting tissues collected with respect to an unusual mortality event for the Tissue Bank.

By "special costs" the Committee intends for NMFS to compensate stranding network participants only for those items which

NMFS recommends the stranding network participant have on hand and which are not included as standard rescue or rehabilitation equipment. For example, during the EXXON VALDEZ oil spill in Alaska, emergency washing facilities had to be set up to clean the otters; purchasing the tubs and plumbing materials might be considered a "special cost". The Committee does not anticipate that gasoline or transport vehicles, or even earth-moving equipment or carcass disposal would be "special costs", since local, county, or State entities normally take responsibility for these items.

An example of costs incurred in preparing and transporting tissues is liquid nitrogen which, because of its cost and storage requirements, is not normally a material stranding network participants have available for day-to-day responses. The Committee expects that NMFS will cover costs such as these, as well as costs for shipping properly collected tissues to the Tissue Bank. All reimbursement by NMFS will be done assuming the stranding network participant has asked for and received permission or authorization to purchase or ship the item, saved the receipts, and filed a claim.

Monies from the Fund will remain available until expended. If the Fund is emptied of monies and pending authorized claims are still outstanding, those claims shall remain pending until such time as there are monies available. The authorized, pending claims shall then be distributed on a first-come, first-served basis.

The "pending claims" subparagraph clarifies that stranding network participants will not be reimbursed by NMFS if they have not received permission for the purchase, if they have not properly filed the claim, or if no monies are available in the Fund to satisfy the claim.

Subsection (c) details that deposits into the Fund will include:

(1) Amounts appropriated to the Fund,

(2) Other amounts that may be appropriated to the Secretary in future years for use in unusual mortality events, and

(3) Any monies received specifically for the Fund in the form of gifts, devises, or bequests.

Subsection (d) permits the Secretary to accept, solicit, and use the services of volunteers, and to accept, solicit, receive, hold, administer, and use any gifts, devises, and bequests. The Committee's intent in giving the Secretary this authority is to enhance the methods by which monies can be collected and dispersed during unusual mortality events involving marine mammals. This section was included to allow the Secretary to accept offers of money and volunteer services during times of emergencies, such as unusual mortality events involving marine mammals in the wild.

Section 306. Liability

Section 306(a) deems a person authorized to respond to a stranding an employee of the government and thus protected by the Federal Tort Claims Act (28 U.S.C. 171). These persons are considered federal employees if they are acting in accordance with a section 112(c) Letter of Agreement or, in the case of an unusual mortality event, acting pursuant to, and in accordance with, either the contingency plan or the best professional judgment of the Onsite Coordinator for any matter not covered by the contingency plan.

Subsection (b) limits the government's liability to simple negligence and not to gross negligence or willful misconduct on the part of the person responding.

For purposes of responding to day-to-day strandings and unusual mortality events, any 112(c) letterholder, including any stranding network participant as defined in this title, shall be considered a Federal employee for the purposes of affording them protection from liability in cases of simple negligence. The stranding network participants are actually acting for the Secretary, essentially as good Samaritans. Thus, the Committee intends to provide those stranding network participants some degree of protection from liability. In the case of simple negligence, it is anticipated the Secretary will be liable, since the letterholder is acting under the contingency plan or at the direction of the Onsite Coordinator. Only in cases of gross negligence or willful misconduct will a stranding network participant or letterholder not be protected.

Section 307. National marine mammal tissue bank and tissue analysis

Section 307(a) requires the Secretary to make provision for the storage, preparation, examination, and archiving of marine mammal tissues. The Committee intends that the National Marine Fisheries Service's Office of Protection Resources will coordinate existing facilities for the archiving of marine mammal tissues into the National Marine Mammal Tissue Bank. The Secretary will set up an identification, tracking, and routing system for tissues coming into and going out of the Tissue Bank.

Presently, there are marine mammal tissues stored at various facilities around the country, including stranding network facilities, clinical laboratories, academic institutions, the National Marine Mammal Laboratory in Seattle, the American Type Culture Society in Baltimore, and the Armed Forces Institute of Pathology and Smithsonian Institution, both in Washington, D.C. However, the majority of these marine mammal tissues are not of adequate quality for inclusion in the Tissue Bank. Any tissues not collected according to the strict, standard, quality-controlled guidance issued under this subsection will not be included in the Tissue Bank. The Committee anticipates that the National Marine Fisheries Service will certainly, if requested by a collector, direct those tissues not strictly collected and preserved to other appropriate tissue repositories around the country.

Tissues from non-stranded marine mammals will also be included in the Tissue Bank. Sources for these tissues include incidental takes by fishermen, subsistence hunting activities by native Americans, and live animal biopsies in the wild. Only those tissues collected according to the Secretary's guidance will be included in the Tissue Bank as reference samples. The Committee expects that tissues form marine mammals that die during unusual mortality events, or during rehabilitation following rescue from the wild, will be included for comparative purposes, if collected appropriately.

There is the potential that the Tissue Bank will, for some species of marine mammals (i.e. endangered or threatened species), be in dire need of comparative and reference tissues, whereas in other cases the species of marine mammal may be common enough that

the collection of tissues for that species in the National Marine Tissue Bank will be adequate. In any case, the Committee expects that superfluous or duplicative efforts will be avoided. These decisions, however, will be up to the Secretary and the Secretary of the Interior.

Currently the National Marine Fisheries Service has responsibility for marine mammal tissues, including those tissues from the Alaska Marine Mammal Tissue Bank, which are stored at the National Institute of Standards and Technology (NIST). NIST itself is under contract from the National Marine Fisheries Service to store the tissues at their facility. The Committee does not intend that National Marine Fisheries Service will establish any new facility for the archiving of tissues, but to use existing facilities.

Subsection (b) directs the Secretary, utilizing a process similar to that in section 307(a), to develop and issue guidelines for use in tissue analysis. These directives will assist collection of blood, bone, fat, and other "non-tissue" materials to be analyzed in a manner that will allow results from one analysis to be compared to other analyses similarly collected and prepared. The Committee expects that these tissue analysis guidelines will include the "most-effective and advanced diagnostic technologies and tools practicable" for assessing overall health or disease in marine mammals. Again, the Committee does not intend that either National Marine Fisheries Service or the U.S. Fish and Wildlife Service will directly be performing these analyses, only providing guidance for standardized analysis in the public and private sectors.

Subsection (c) directs the Secretary to develop and maintain a central data base to ensure an effective means for tracking and accessing data on marine mammals, including relevant data on all samples collected for, and maintained in the Tissue Bank. Additional examples of data that the Committee minimally expects the National Marine Fisheries Service to include in its computerized data base are:

(1) A bibliography of recent and current scientific papers and textbooks related to marine mammal strandings, unusual mortality events, health, disease, rehabilitation, and life history related to these topics. The Committee estimates approximately 10,000 to 12,000 appropriate references exist in both the scientific and government literature, the majority of which is not yet computer-cataloged at the Marine Mammal Commission in Washington, DC and the National Marine Mammal Laboratory Library in Seattle, Washington;

(2) Collated basic minimum information documented by stranding network participants on a monthly basis and sent to their Regional offices, as well as any supplemental information such as current weather, tides, human/predator activities, etc.;

(3) Incidental subsistence take numbers; and

(4) Any other tissue samples properly taken, for instance during the course of any permitted scientific investigation designed to study issues unrelated to the Tissue Bank goals.

Marine mammal populations historically have been monitored indirectly by NMFS during fishery-marine mammal interaction studies. The Committee expects that the information gathered in

fisheries-marine mammal studies will also be incorporated into the data bank to assist scientists in population investigations.

The Committee also expects the data base to be compatible with standard hardware and software programs that a qualified scientist or a stranding network participant might have available for his/her use.

Subsection (d) directs the Secretary, in consultation with the Secretary of the Interior, to establish criteria, after an opportunity for public review and comment, for providing access for qualified scientists, including stranding network participants, to tissues in the Tissue Bank, to tissue analysis results and to other applicable marine mammal reference data and literature references in the data base.

Of all the provisions in this Act, it is anticipated that archived tissue samples, and standardized, quality controlled tissue analyses will provide the most insightful evidence for determining why marine mammals strand themselves, how unusual mortality events occur, and how detrimental these events are to marine mammal populations.

Section 308. Authorization of appropriations

This section authorizes the following amounts to be appropriated for carrying out this new title to the Marine Mammal Protection Act:

(1) $250,000 for fiscal 1993 and fiscal 1994 for administrative activities (all sections except sections 305 and 307);

(2) $250,000 for fiscal 1993 and fiscal 1994 for the Tissue Bank, Tissue Analysis and Data Bank (Sec. 307); and

(3) $500,000 to the Fund (Sec. 305) for fiscal 1993.

Section 3(b) directs the Secretary to implement, within 24 months after enactment of this new title: (1) sections 302(a) and 302(b) of the new Title III, gathering clearinghouse information and defining objective criteria for determining at what point a marine mammal is returnable to the wild, for use by stranding network participants; and (2) section 304(b) the preparation of a detailed contingency plan for responding to any marine unusual mortality event.

SECTION 4. CONFORMING AMENDMENTS

This Section adds Title III to the applicable purposes of the MMPA. These amendments to the MMPA will grant an exemption for authorized stranding network participants to rescue, transport and rehabilitate stranded or beached marine mammals in the timeliest fashion.

SECTION 5. DEFINITIONS

Section 5 defines the following terms: Secretary (meaning the Secretary of Commerce); Fund (the Unusual Mortality Event Fund); Office (the Office of Protected Resources within National Marine Fisheries Service); stranding (dead or live marine mammal on the beach or in the water, unable to return to its natural habitat under its own power); stranding network participant (letter-holders under section 112(c) and 109(h)(1)); tissue bank (section

307(a)'s National Marine Mammal Tissue Bank); and, unusual mortality event (a stranding that is an unexpected, significant die-off of marine mammals demanding immediate attention).

Calendar No. 759

102D CONGRESS 2d Session | SENATE | REPORT 102-438

MARINE MAMMAL HEALTH AND STRANDING RESPONSE ACT

SEPTEMBER 30, 1992.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1898]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1898) to amend the Marine Mammal Protection Act of 1972 to provide for examination of the health of marine mammal populations and for effective coordinated response to strandings and catastrophic events involving marine mammals, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

S. 1898 as reported would amend the Marine Mammal Protection Act of 1972 (MMPA) to provide for monitoring of the health of marine mammal populations and for coordinated response to the stranding and unusual mortality of marine mammals.

BACKGROUND AND NEEDS

Marine mammals beach and strand themselves regularly along shorelines throughout the world: In the United States, about 1,400 seals and sea lions and 600 whales and dolphins are stranded in coastal areas each year. To respond to such incidents, the National Oceanic and Atmospheric Administration (NOAA) has established a series of marine mammal stranding networks. The networks are operated independently out of the regional NOAA offices and are staffed primarily by volunteers. As network members, the volunteers are issued letters of agreement from NOAA which authorize

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their activities under the MMPA. The volunteers include both nonprofit and for-profit organizations and institutions such as zoos, aquaria, and universities. They receive little Federal assistance; their efforts are financed primarily through private and corporate donations and grants.

The networks respond to strandings of both live and dead marine mammals. Network members rescue and rehabilitate live stranded animals. They report monthly to NOAA on the marine mammals that have been or are presently in their care. After treatment, these animals are restored to the wild or used for public display. Dead stranded animals are useful in advancing scientific information in such areas as marine mammal physiology and ecology and in assessing effects of human interaction.

In addition to the relatively common strandings, unusual mortality events occur occasionally, involving larger numbers of marine mammals. Three such events attracted widespread public attention in recent years—the 1987 stranding of 14 humpback whales off Cape Cod; the 1987-88 bottlenose dolphin die-off along the Atlantic seaboard; and the 1989 *Exxon Valdez* oil spill in Alaska, which caused injury and death to many marine mammals. These incidents caused significant die-offs of marine mammal populations and demonstrated the inadequacy of current Federal response systems to such unexpected events. Further, the incidents exposed the limitations of current programs for monitoring trends in the health of marine mammal populations and identifying the causes of unusual mortality events.

In a subsequent review of the agency's handling of these situations, NOAA officials concluded that two improvements were needed: (1) development of contingency plans to facilitate a more effective initial response that would minimize the deaths of marine mammals and assist in identifying potential causes; and (2) establishment of a "tissue bank" that would provide baseline information on marine mammal populations and allow comparison of contaminant levels in the tissues of stranded animals to those in the wild population.

Legislative History

S. 1898 was introduced on October 31, 1991, by Senator Lautenberg. On July 23, 1992, the full Committee and the National Ocean Policy Study held a hearing on pending legislation to strengthen the MMPA and received testimony on S. 1898. The reported bill makes a number of changes suggested by the testimony, and is very similar to a companion bill, H.R. 3486, which was passed by the House of Representatives on August 3, 1992. On August 11, 1992, the Committee, in open executive session ordered the legislation reported, without objection and with an amendment in the nature of a substitute.

Summary of Major Provisions

S. 1898 as reported would amend the MMPA to provide a statutory basis for NOAA's marine mammal health and stranding responses activities. The reported bill would add a new title III to the MMPA, establishing a program to provide for the rescue and rehabilitation of live stranded marine mammals and the collection of

scientific information from dead animals. The legislation also would require development of contingency plans for responding quickly and effectively to an unusual event, such as a die-off, and for identifying potential causes of the event. S. 1898 would establish a National Marine Mammal Tissue Bank (Tissue Bank) for archiving marine mammal tissues using standardized procedures, as well as a central information system on marine mammals for reference by both Government and private users. The reported bill authorizes funding of $500,000 in each of the fiscal years (FY) 1993 and 1994 for these activities. It also authorizes $500,000 in FY 1993 for a Marine Mammal Unusual Mortality Event Fund (Fund) to compensate persons for costs incurred in responding to strandings and unusual mortality events.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the Following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 11, 1992.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 1898, the Marine Mammal Health and Stranding Response Act.

Because enactment of S. 1898 may affect direct spending and receipts, this bill would be subject to pay-as-you-go procedures under the Budget Enforcement Act of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Robert D. Reischauer, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 1898.
2. Bill title: Marine Mammal Health and Stranding Response Act.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science and Transportation on August 11, 1992.
4. Bill purpose: S. 1898 would amend the Marine Mammal Protection Act of 1972 to establish a program to monitor and document marine mammal health trends, to correlate these data with environmental information, and to coordinate effective responses when a large number of marine mammals unexpectedly die or are stranded in U.S. waters or beaches. To cover the costs of this program, the bill would authorize the appropriation of $250,000 for each of fiscal years 1993 and 1994.

The bill also would establish a Marine Mammal Unusual Mortality Event Fund and would authorize the appropriation of $500,000

to the fund in 1993 for the costs of responding to marine mammal deaths or strandings. In addition, the bill would authorize the appropriation of $250,000 for each of fiscal years 1993 and 1994 for the Secretary of Commerce to establish a National Marine Tissue Bank.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1993	1994	1995	1996	1997
Authorizations:					
Authorization level	1.0	0.5			
Estimated outlays	0.5	0.7	0.2	0.1	
Direct spending:					
Estimated budget authority	(1)	(1)	(1)	(1)	(1)
Estimated outlays	(1)	(1)	(1)	(1)	(1)
Revenues:					
Estimated revenues	(1)	(1)	(1)	(1)	(1)

[1] Less than $50,000.

The costs of this bill fall within budget function 300.

Basis of estimate

CBO assumes that S. 1898 would be enacted before the end of fiscal year 1992, and that all funds authorized would be appropriated prior to the beginning of each fiscal year. Estimating when the $500,000 authorized for the Marine Mammal Unusual Mortality Event Fund would be spent is difficult, because such events are unpredictable. Based on information from the National Fisheries Management Service, CBO estimates that it is likely that the amounts in the fund would be spent in the first two years. We project that other spending would occur at historical rates for activities of the National Oceanic and Atmospheric Administration. We expect that the Marine Mammal Unusual Mortality Event Fund would use any gifts or donations to pay for claims pending in that year. CBO expects that the amounts involved would be negligible in each year.

6. Pay-as-you-go considerations: The Budget Enforcement Act of 1990 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1995. S. 1898 would allow the Secretary of Commerce to solicit, accept, and spend private donations for the Marine Mammal Unusual Mortality Event Fund. The collection of donations would affect governmental receipts and their use would affect direct spending, but the amounts involved would be small and the budgetary impact in any year would be negligible.

7. Estimated cost to State and local governments: None.

8. Estimate comparison: None.

9. Previous CBO estimate: On July 21, 1992, CBO prepared an estimate for H.R. 3486, the Marine Mammal Health and Stranding Response Act, as ordered reported by the House Committee on Merchant Marine and Fisheries. H.R. 3486 is nearly identical to S. 1898. Accordingly, CBO's estimate of the cost of S. 1898 is the same as that of the bill reported in the House.

10. Estimate prepared by: Patricia A. Conroy.

11. Estimate approved by: C.G. Nuckols, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

The bill, as reported, would improve existing programs to respond to marine mammal stranding and unusual mortality events carried out under the MMPA. It should have no effect on the number or type of individuals and businesses regulated, nor on the personal privacy of such persons or organizations. In addition, the legislation may serve to reduce paperwork and economic costs for persons involved in the regional stranding networks, because the reported bill would clarify the chain of authority and response procedures, and establish uniform methods for collecting and processing information and samples under the program.

Section-by-Section Analysis

SECTION 1.—SHORT TITLE

Section 1 designates the short title of the legislation as the "Marine Mammal Health and Stranding Response Act."

SECTION 2.—FINDINGS

Section 2 sets forth eight congressional findings regarding the need to strengthen programs for assessing the health of marine mammals in the wild and for responding to strandings and unusual marine mammal mortality events.

SECTION 3.—MARINE MAMMAL HEALTH AND STRANDING RESPONSE PROGRAM

Section 3(a) amends the MMPA to add a new title III—Marine Mammal Health and Stranding Response Program. The new title contains several sections.

Section 301. Establishment of the program

New section 301(a) calls for the Secretary of Commerce (Secretary) to establish a Marine Mammal Health and Stranding Response Program. The Secretary is required to consult with the Secretary of the Interior and Marine Mammal Commission in implementing the program and with knowledgeable and experienced members of the public. The Committee anticipates that public participants will include public interest organizations with expertise related to marine mammals.

New section 301(b) states the purposes of the program: (1) to improve information systems related to the health of marine mammal populations; (2) to correlate health trends in wild marine mammal populations with available environmental information; and (3) to coordinate more effectively responses to unusual mortality events. The program is intended to cover all types of marine mammals, including cetaceans (whales and dolphins, pinnipeds (seals, sea lions,

and walruses), sea otters, manatees, and other marine mammals which may become stranded.

It is important that the reference data collected under the program include available information on the levels of biotoxins, pollutants, and other contaminants in the tissues of marine mammals. Collection of such data will allow comparison of contaminant levels in stranded marine mammals to levels occurring in animals in the wild. The information will provide an indicator of the general health of marine mammal populations, forming the basis for assessing trends and fluctuations in marine mammal contaminant levels. Under the legislation, this assessment would focus on trends in wild populations. The program established in this new section is not intended to apply to marine mammals currently held in captivity, at such facilities in the United States as aquaria or zoos.

Section 302. Determination; Data collection and dissemination

New section 302(a) requires the Secretary, in consultation with the Secretary of the Interior, the Marine Mammal Commission, and other appropriate individuals, to develop objective criteria for releasing a rehabilitated marine mammal to the wild. New section 302(b) requires the Secretary, in consultation with the Secretary of the Interior, to compile existing information on strandings; practices for rescuing and rehabilitating stranded animals; procedures for processing marine mammal tissue samples; information for comparing marine mammal deaths and illnesses with environmental parameters; and relevant scientific literature. Finally, new section 302(c) requires the Secretary to make any information collected under this section available to stranding network participants and other qualified scientists.

Section 303. Stranding response agreements

New section 303 authorizes the Secretary to enter into an agreement, under existing section 112 of the MMPA, to allow the taking of marine mammals in response to a stranding. Such agreements would be required to specify the persons covered under the agreement and the terms and conditions under which authority could be delegated. The section also requires periodic review by the Secretary of such agreements.

Section 304. Unusual mortality event response

This section establishes guidelines and procedures to ensure a coordinated response to marine mammal die-offs and other unusual mortality events. New section 304(a) requires the Secretary, in consultation with the Secretary of the Interior, to establish a marine mammal unusual mortality event working group, consisting of scientific experts. The working group would provide guidance for identifying the onset and duration of an unusual mortality event and developing contingency plans for responding to such events. The Secretary would be required to notify the group when there is evidence that an unusual mortality event has begun and to designate an onsite coordinator. The Committee anticipates that representatives from interested humane and animal welfare organizations will be considered as potential participants in the working group. The working group would be exempted from the Federal Advisory Committee Act in order to waive annual reporting requirements, and to ensure long-term continuity of the group.

Subsection (b) of this new section identifies required contingency plan elements, including a list of persons capable of assisting the Secretary in responding to the event; a description of the types of tissues and tissue analyses necessary to diagnose causes of unusual mortality events; procedures for training, mobilizing, and using available resources in a response; and requirements for minimizing marine mammal deaths, providing appropriate care, and identifying the causes and impacts of the event. In developing the contingency plan, specific rescue and rehabilitation techniques for individual species and types of marine mammals should be considered. For example, different care and handling procedures may be required for species such as sea otters, polar bears, and fur seals. Alternatively, a single response procedure may be appropriate for dealing with coastal small cetaceans. Finally, the contingency plan should identify scientific institutions with expertise that could be called upon during an unusual mortality event.

Subsection (c) discusses designation and duties of the Federal onsite coordinator responsible for implementing the contingency plan and responding to an unusual mortality event.

Section 305. Unusual mortality event activity funding

New section 305 would establish the Fund in the General Treasury. Moneys in the Fund would be available for use by the Secretary, in consultation with the Secretary of the Interior, to compensate persons for: (1) special costs incurred in responding to unusual mortality events; and (2) costs incurred in collecting and transporting tissues for archival. The Fund is to be made available only the Secretary and only for responding to unusual mortality events. However, the Committee expects that the Secretary will work closely with the Secretary of the Interior in dealing with claims from an event in which the marine mammals primarily involved are species for which the Secretary of the Interior has responsibility under the MMPA (sea otters, polar bears, walruses, and manatees).

New section 305 also permits the Secretary to accept, solicit, and use the services of volunteers, and to accept and use gifts, devises, and bequests to the Fund. The Secretary also is authorized to deposit appropriate moneys in the funds.

Section 306. National marine mammal tissue bank and tissue analysis

New section 306(a) establishes the Tissue Bank to provide for the storage, preparation, examination, and archiving of marine mammal tissues. Samples for the Tissue Bank would be collected during mortality events, from healthy marine mammals caught accidentally by commercial and subsistence fishermen, and in the course of scientific research.

Establishment of the Tissue Bank is not intended to provide for or promote any increase in takes of health marine mammals to provide samples of tissues. Rather, the Tissue Bank will provide for greater order and quality in the archiving of tissue samples cur-

rently being taken, and promote more adequate sampling and archiving of tissues taken from stranded and dead marine mammals.

Subsection (b) requires the Secretary, in consultation with the Marine Mammal Commission and the Secretary of the Interior and after opportunity for public review and comment, to issue guidance on methods for processing and analyzing tissue samples. Presently, there are marine mammal tissues stored at various facilities around the country. Most of these tissues, however, are not of adequate quality for inclusion in the Tissue Bank. This section provides for establishment of strict, quality-controlled standards for Tissue Bank inclusion.

Subsection (c) directs the Secretary to develop and maintain a central data base to track and access data on marine mammals, including information on all samples contained in the Tissue Bank.

Finally, subsection (d) directs the Secretary to establish criteria for access by qualified scientists (including stranding network participants) to the Tissue Bank, tissue analysis results, and other applicable marine mammal reference material in the data base. The Committee expects the Secretary to provide for reasonable public access to marine mammal reference materials and information collected under this program.

Section 307. Authorization of appropriations

New section 307 authorizes appropriations of: (1) $250,000 for each FY 1993 and FY 1994 for administration of the program; (2) $250,000 annually for FY 1993 and FY 1994 for the Tissue Bank, tissue analysis, and data base; and (3) $500,000 in FY 1993 for the Fund.

Section 308. Definitions

New section 308 defines several terms for the purpose of implementing new title III, including "Fund," "stranding," "stranding network participant," "Tissue Bank," and "unusual mortality event."

Under section 3(b) of S. 1898 as reported, the Secretary is required, within 24 months of the date of enactment of the legislation, to: (1) develop and implement objective criteria on returning rehabilitated marine mammals to the wild; and (2) collect and make available information on marine mammal health and health trends. This section also requires the Secretary to issue a detailed contingency plan for responding to unusual mortality events in proposed form within 18 months of the date of enactment of the legislation, and in final form within 24 months of the date of enactment of the legislation.

SECTION 4.—CONFORMING AMENDMENTS

This section of the reported bill makes three conforming amendments to existing provisions of title I of the MMPA to reference new title III. This section also would clarify the definition of "Secretary."

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