

July 21, 2025

Via Email

The Honorable Harriet Hageman
Chair, Subcommittee on Water, Wildlife and Fisheries
U.S. House of Representatives
Committee on Natural Resources

Re: Marine Mammal Protection Act Discussion Draft Bill

Dear Chair Hageman:

We write in support of the discussion draft bill (“Draft Bill”) to amend the Marine Mammal Protection Act (“MMPA”), submitted by Representative Begich. The undersigned trade associations represent many of our Nation’s great fisheries, ranging from Maine to Hawaii, as well as the hard-working men and women that make our fisheries succeed. But success is becoming harder to achieve in an increasingly burdensome regulatory environment. And for the fisheries that compete with large, subsidized foreign fleets, these regulatory challenges create distinct disadvantages that are almost impossible to overcome. We help fleets and fishermen navigate the maze of federal laws and regulations that govern U.S. fisheries, as well as engage in advocacy, education, stewardship, marketing, and collaborative research to support our fleets. The Draft Bill reflects a positive and necessary step toward helping to ensure the future success of American fisheries.

The last significant amendments to the MMPA’s provisions governing commercial fisheries occurred in 1994. Those amendments responded to a court decision that effectively prevented the National Marine Fisheries Service (“NMFS”) from issuing incidental take permits to commercial fisheries for certain marine mammal stocks.¹ A primary goal of the 1994 amendments was to remove this impediment.² Indeed, the sponsors of the 1994 amendments made clear that the MMPA must allow “our fishermen to continue fishing”³ and intended the statutory updates to “strengthen and extend the protection afforded to marine mammals under the MMPA *without damaging our important commercial fisheries*.”⁴

Unfortunately, in the ensuing decades, Congress’s intent was lost on NMFS’s Protected Resources Division.⁵ Over the years, NMFS has repeatedly adopted and applied interpretations of the MMPA that resolve all ambiguities against fisheries, justifying this biased approach on the idea that NMFS should apply the “precautionary principle” to all MMPA decisions. NMFS has embedded this approach in the many internal policies and guidance documents it uses to apply most of the key terms and standards in Sections 117 and 118 of the MMPA.⁶ Decades of NMFS injecting this bias into all of its interpretive documents and applying it as the paramount principle in virtually all regulatory decisions makes it almost impossible to restore Congress’s intent through agency reform. Instead, targeted statutory changes are necessary to redirect the agency, reduce ambiguity, and eliminate duplicative and inconsistent provisions.

Without such changes, U.S. fisheries will increasingly face insurmountable regulatory challenges. For example, but for a landmark decision by the D.C. Circuit Court of Appeals and congressional intervention, NMFS’s application of the MMPA (and the Endangered Species Act [“ESA”]) would have devastated or eliminated longstanding Northeast lobster fisheries. There, NMFS’s use of the “precautionary principle” and inherently biased modeling resulted in the generation of hypothetical lobster fishery impacts to North Atlantic right whales that could not be reconciled with the available data and were so extreme that, as NMFS admitted in court filings, would have required “massive shutdowns of federal fisheries” to comply with MMPA standards (as interpreted by NMFS).⁷ Even worse, those shutdowns would have made no difference to the North Atlantic right whale population, which, as NMFS also admitted, was

¹ See *Kokechik Fishermen’s Ass’n v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988); 80 Fed. Reg. 48,171, 48,173 (Aug. 11, 2015); S. Rep. No. 103-220, at 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 518, 520.

² See, e.g., 140 Cong. Rec. S3288-01, S3293 (Mar. 21, 1994); 139 Cong. Rec. S15321-01, S15326 (Nov. 8, 1993).

³ Statement of Mr. Stubbs, 140 Cong. Rec. H2714, H2724 (Apr. 26, 1994).

⁴ 40 Cong. Rec. S4923, S4934 (Apr. 26, 1994) (emphasis added).

⁵ NMFS’s Protected Resources Division is distinct from NMFS’s Sustainable Fisheries Division. The former is statutorily responsible managing federally protected species, such as marine mammals. The latter is responsible for managing federal fisheries (along with regional fishery management councils). As used in this letter, “NMFS” refers to NMFS’s Protected Resources Division.

⁶ Section 117 addresses marine mammal “stock assessments” and Section 118 addresses the “taking of marine mammals incidental to commercial fishing operations.”

⁷ *Ctr. for Biological Diversity v. Raimondo*, No. 18-cv-112, Dkt. 228 at 26 (D.D.C.).

“likely to decline if human-caused mortalities in Canada continue at current rates, *regardless of efforts in the United States*.”⁸

As another example, NMFS’s application of the MMPA has resulted in the imposition of costly gear requirements and closures—and, now, contemplated effort reduction—in the Hawaii-based commercial longline tuna fishery. Those “take reduction” restrictions are intended to address limited fishery interactions with a false killer whale population that widely ranges across the Central Pacific Ocean, numbering in the many thousands. Rather than acknowledging and acting upon data showing that the false killer whale “take reduction team” should have never been formed in the first place, NMFS instead created an artificial fishery impact scenario by applying biased, precautionary presumptions to cabin the true range of the false killer whale population and ascribe “serious injury and mortality” to *de minimis* fishery interactions. Based on this false scenario, the fishery now faces the prospect of new MMPA regulations that could ravage the fleet.

These are not isolated examples—NMFS’s “precautionary” approach to the MMPA has similarly and negatively affected many other fisheries over the past three decades. To make matters worse, NMFS’s biased approach to the MMPA is now being imported by some states, such as California, which has used MMPA standards—as misinterpreted and misapplied by NMFS—as a basis for imposing punishing state-level regulations that have been disastrous for the California commercial Dungeness crab fishery.

The Draft Bill would make crystal clear that—as Congress has always intended—MMPA decisions must be based on the best *available* data without application of the “precautionary principle,” precautionary assumptions, worst-case scenarios, or any other factors or assumptions that bias the objective application of the best available data. This aligns with the D.C. Circuit Court’s opinion in *Maine Lobstermen’s Association v. NMFS*, where the Court held that NMFS’s decision, under the ESA, to “indulge in worst-case scenarios and pick ‘pessimistic’ values in order to give ‘the benefit of the doubt’ to the species” was “not just wrong; it was egregiously wrong.”⁹ The Court explained:

[W]hen the Congress wants an agency to apply a precautionary principle, it says so. . . . The precautionary principle, taken seriously, can multiply an agency’s power over the economy. It allows an agency to regulate or veto activities even if it cannot be shown that those activities are likely to produce significant harms.... When the Service applies a substantive presumption to distort the analysis, the public can have no confidence that economic dislocation is needed to protect a species and is not the result of speculation or surmise by overly zealous agency officials.

Id. at 599-600. This reasoning applies equally to the MMPA, which, like the ESA, contains no language directing NMFS to use the “precautionary principle” or to make assumptions “in favor of the species.” Rather, both laws require NMFS to *objectively* apply statutory standards based

⁸ *Id.*, BiOp_2177 (administrative record).

⁹ 70 F.4th 582, 595, 598 (D.C. Cir. 2023).

on the best *available* data. Unfortunately, despite the D.C. Circuit Court’s clear instruction, NMFS continues to inject the “precautionary principle” into all its MMPA decisions, necessitating congressional action.

The Draft Bill will help to address these serious problems not only by clarifying that the “precautionary principle” has no role in MMPA decision-making, but also by amending certain provisions of Sections 117 and 118 that have been misinterpreted and misapplied by NMFS. These draft amendments include establishing much-needed statutory definitions for terms such as “negligible impact” and “serious injury”—both of which have been unreasonably interpreted by NMFS through internal agency guidance. The draft amendments also include a long overdue revision of the MMPA’s take reduction planning provisions to establish realistic and clear goals, eliminate unnecessary process, and clarify that NMFS may only impose measures that are technically, operationally, and economically feasible. In addition, the draft revisions to terms such as “minimum population size” and “potential biological removal level” will both create important limits on NMFS’s discretion to apply precautionary factors and encourage NMFS to obtain real data (rather than apply models) to inform decisions. Finally, along with these changes to the MMPA, the Draft Bill would follow the example of important bipartisan legislation enacted in 2022 to extend a pending deadline for the implementation of potentially ruinous MMPA regulations governing Northeast lobster fisheries to 2035.

We welcome and strongly support the revisions and amendments reflected in the Draft Bill. Over the past three decades, U.S. fisheries have implemented countless mitigation and monitoring requirements, suffered closures, and expended thousands of hours in “take reduction team” meetings in good faith attempts to comply with the MMPA. But NMFS’s application of the MMPA, as described above, has created an untenable situation that Congress did not contemplate. Heavy regulation comes at a heavy cost, and the costs are becoming too much to bear for vessel owners with thin profit margins and for American fleets that compete daily with aggressive, largely unregulated foreign fleets. It is time for Congress to step in and clarify and amend the MMPA.

We appreciate your consideration of these comments.

Sincerely,



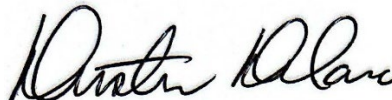
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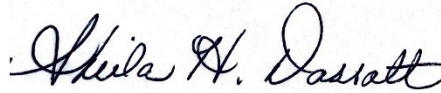
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