

Subcommittee on Oversight and Investigations

Bruce Westerman, Chairman

Hearing Memorandum

July 14, 2017

To: All Subcommittee on Oversight and Investigations Members

From: Majority Staff, Melissa Beaumont and Christen Harsha,
Subcommittee on Oversight and Investigations (x5-7107)

Hearing: Oversight hearing entitled “*Examining Impacts of Federal Natural Resources Laws Gone Astray, Part II*”

The House Committee on Natural Resources, Subcommittee on Oversight and Investigations will hold an oversight hearing titled, “*Examining Impacts of Federal Natural Resources Laws Gone Astray, Part II*” on **Tuesday, July 18th, at 10:00 a.m. in Room 1324 of the Longworth House Office Building.**

Policy Overview:

- This oversight hearing will examine the federal government’s implementation of the Marine Mammal Protection Act of 1972 and the National Historic Preservation Act of 1966, with a focus on instances where the application of these statutes strays past the original intent of Congress.
- Over the years, implementation of these laws in certain instances has evolved beyond their original mission and has led to burdensome and inefficient regulatory processes, litigation, and adverse effects on the American taxpayer.
- The hearing will highlight provisions of these laws that are vulnerable to abuse, as well as identify potential reforms to improve the effectiveness and efficiency of the acts.

Invited Witnesses (in alphabetical order):

Ms. Patty Brandt
Resident, Eastmoreland Neighborhood
Portland, Oregon

Ms. Amanda C. Leiter
Professor
American University, Washington College of Law
Washington, DC

Amos J. Loveday, Ph.D.
Atchley Hardin Lane, LLC
Columbus, OH

Ms. Nikki Martin
President
International Association of Geophysical Contractors (IAGC)
Houston, Texas

Background:

Overview of the Marine Mammal Protection Act of 1972

The Marine Mammal Protection Act (MMPA) of 1972 established a moratorium on the “taking” of marine mammals in U.S. waters, as well as on importing marine mammals and marine mammal products.¹ Congress passed the MMPA based on the finding that certain marine species and stocks were in danger of extinction as a result of human behavior and that these species and stocks must not fall below an “optimum sustainable population” level.² The MMPA gives the Secretary of Commerce through the National Oceanic and Atmospheric Agency’s (NOAA) National Marine Fisheries Service (NMFS) and the Secretary of Department of the Interior (DOI) through the Fish and Wildlife Service (FWS) authority for the conservation and management of marine mammal species.³

Definitions of “Take” and “Harassment”

Both the MMPA and the Endangered Species Act (ESA) employ the concept of “take” to refer to prohibited activities.⁴ The MMPA defines “take” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”⁵ The Code of Federal Regulations further details the “taking” of a marine mammal to include:

the collection of dead animals . . . ; the restraint . . . of a marine mammal, no matter how temporary; the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild.⁶

Some scientists have suggested that the definition of “take” under the MMPA warrants re-evaluation. Critics believe that the definition, in its current form, may be “overly broad and encompassing, as well as unenforceable in many situations.”⁷

¹ Marine Mammal Protection Act, Pub. L. No. 92-552, 86 Stat. 1027 (1972).

² Marine Mammal Protection Act § 2.

³ Eugene H. Buck, CONG. RESEARCH SERV., RL30120, THE MARINE MAMMAL PROTECTION ACT: REAUTHORIZATION ISSUES 4(2007), available at

<http://www.crs.gov/Reports/RL30120?source=search&guid=8cdd98143e5e4d30bd414859146fa4ba&index=5# Toc 229466607>.

⁴ See Nat’l Marine Fisheries Serv., U.S. Dep’t of Commerce, Protected Resource Glossary, <http://www.nmfs.noaa.gov/pr/glossary.htm> (last visited July 13, 2017).

⁵ 16 U.S.C. § 1362(13) (2015).

⁶ 50 C.F.R. § 216.3 (2016).

⁷ Buck, *supra* note 3, at 36.

The 1994 reauthorization of the MMPA re-defined the term “harassment” under the MMPA to include two levels of harassment—level A and level B.⁸ In general, “level A” refers to harassment with the potential to injure a marine mammal while “level B” includes harassment with the potential to disturb a marine mammal.⁹

However, some federal agencies have found it difficult in the past to enforce “level B” harassment, which leaves the public with much uncertainty as to what may constitute harassment.¹⁰ For instance, under this definition, it is unclear whether any recreational, commercial, or scientific activity simply noticed by a marine mammal qualifies as harassment under the MMPA.¹¹

MMPA Exemptions and Take Authorizations

While the MMPA bans the taking of marine mammals, the law does include some exceptions. It contains an exemption for any Alaskan Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific or Arctic oceans, provided the taking concerned is for subsistence reasons or for the creation and sale of authentic Native American goods and clothing.¹² A waiver can also be granted by the federal government for states who are given the authority to oversee conservation and management of a species, known as management authority, as long as the taking does not disadvantage the affected species or population.¹³ The FWS or NMFS may also issue permits to authorize the take or import of marine mammals for scientific research or for activities to enhance the survival or recovery of the species.¹⁴ The Secretary is authorized to issue incidental take authorizations specific to commercial fishing and for non-fishery commercial activities.¹⁵

Incidental Take Authorizations

The MMPA allows U.S. citizens to apply for authorization for the taking of marine mammals incidental to activities other than commercial fishing, if such a taking has only a negligible impact on the species or stock and if the monitoring requirements and other conditions are met.¹⁶ There are two types of authorizations that can be issued— a letter of authorization (LOA) and an incidental harassment authorization (IHA):¹⁷

⁸ §1362(18); Buck, *supra* note 3, at 36.

⁹ § 1362(18)(C)-(D).

¹⁰ U.S. COMM’N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT 312 (2004), available at http://www.jointoceancommission.org/~media/JOCI/PDFs/USCOP_report.pdf.

¹¹ *Id.*

¹² § 1371(b).

¹³ *Id.* § 1371(a)(1).

¹⁴ *Id.* § 1371(a)(1).

¹⁵ *Id.* § 1371(a)(5)(A).

¹⁶ *Id.* § 1371(a)(5)(A), (D).

¹⁷ 50 C.F.R. § 216.101-216.108 (2016); Nat’l Marine Fisheries Serv., U.S. Dep’t of Commerce, Incidental Take Authorizations under the MMPA, <http://www.nmfs.noaa.gov/pr/permits/incidental/> (last visited July 13, 2017).

- A *letter of authorization (LOA)* is required for activity that may result in harassment for multiple years or that may result in serious injury or mortality of marine mammals. LOAs are valid for up to five years.¹⁸
- An *incidental harassment authorization (IHA)* is required for an activity that may result in harassment only, such as disturbance or injury, and is effective for one year.¹⁹

These authorizations are often issued for activities that produce underwater sounds, such as oil and gas development activities, military sonar and exercises, geophysical surveys for energy development and scientific research, or construction projects.²⁰ The NMFS will issue an incidental take authorization if they find that the take will be a small number, only have a negligible impact on the species or stock, and that the activity will not have an “unmitigable adverse impact” on the availability on the species or stock for subsistence use.²¹

While the MMPA provides an opportunity for people and organizations to partake in activities that may cause some kind of harassment to marine mammals, the process to obtain an incidental take authorization is known to be very extensive and time consuming.²² Under the MMPA, statutory deadlines are stipulated for the processing of the IHA applications.²³ The law stipulates that NMFS or FWS must publish a proposed authorization for public comment not later than 45 days after an application is received and must make it available for public comment for 30 days.²⁴ NMFS or FWS must issue a decision on an IHA no later than 45 days after this comment period has closed.²⁵ Despite these statutory deadlines, companies have waited years to have their application processed, which creates a great deal of uncertainty as IHAs are only issued for one year.²⁶

National Historic Preservation Act

In 1966, Congress enacted the National Historic Preservation Act (NHPA) in response to fears that properties with historical significance faced destruction or substantial alternation.²⁷ The post-World War II expansion of urban areas, highways, and commercial development

¹⁸ NOAA Fisheries website, “Incidental Take Authorizations under the MMPA”, available at <http://www.nmfs.noaa.gov/pr/permits/incidental/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ §1371(a)(5)(A).

²² *Examining Deficiencies in Transparency at the Department of the Interior: Hearing Before the Subcomm. on Energy and Mineral Resources of the H. Comm. on Natural Res.*, 114th Cong. (2016) (statement of Peter Seidel, International Association of Geophysical Contractors) [hereinafter *Hearing*], available at https://naturalresources.house.gov/uploadedfiles/seidel_testimony.pdf.

²³ § 1371.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Hearing*, *supra* note 22.

²⁷ National Historic Preservation Act, Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (as amended by Pub. L. No. 96-515).

sparked Congress' desire to protect historical resources.²⁸ Prior to this legislation's passage, in 1965, President Lyndon B. Johnson assembled a special committee on historic preservation, which produced a report encouraging the federal government to play a more active role in historical preservation.²⁹

The statute includes numerous provisions aimed at these goals. The NHPA created the Advisory Council on Historic Preservation (ACHP),³⁰ an independent agency, to advise the President and Congress on historical preservation matters, review policies of federal agencies instituted under the statute, and coordinate with state and local governments regarding historical preservation activities.³¹ The law also set criteria for the approval of State Historic Preservation Programs (SHPPs), with each state appointing a State Historic Preservation Officer (SHPO) to administer its program.³² The SHPO's duties include: maintaining a statewide inventory of historic properties; administering applications for listing historic properties on the National Register of Historic Place (NR); implementing a statewide historic preservation plan; and cooperating with other agencies at the federal, state, and local government.³³ The NHPA also authorizes Native American tribes to assume the functions of SHPOs if the tribes satisfy certain requirements,³⁴ and these are sometimes referred to as Tribal Historic Preservation Officers (THPOs).³⁵

National Register of Historic Places Designations

The law also established the NR to include "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture."³⁶ The National Park Service (NPS) is responsible for maintaining the NR and overseeing its designation program. It promulgates regulations for nominating properties for inclusion or removal from the NR, making eligibility determinations, and notifying the owner, local governments, and the public when a property is considered for inclusion.³⁷ Properties holding traditional religious or cultural importance to Native American tribes may also be eligible for listing in the NR.³⁸

NPS regulations set forth the criteria used to evaluate properties for nomination.³⁹ A property must hold significance in "American history, architecture, archaeology, engineering, and culture"; and "possess integrity of location, design, setting, materials, workmanship, feeling,

²⁸ See *id.* See also Nat'l Park Serv., National Historic Preservation Act, <https://www.nps.gov/subjects/historicpreservation/national-historic-preservation-act.htm> (last visited July 12, 2017).

²⁹ See Nat'l Park Serv., *supra* note 28.

³⁰ 54 U.S.C. § 304101 (2015).

³¹ See *id.* § 304102.

³² *Id.* § 302301.

³³ *Id.* § 302303.

³⁴ *Id.* § 302702.

³⁵ 36 C.F.R. § 800.2(c)(2)(i)(A) (2004).

³⁶ 54 U.S.C. § 302101.

³⁷ *Id.* § 302103.

³⁸ *Id.* § 302706.

³⁹ 36 C.F.R § 60.4 (2016).

and association⁴⁰ It must also be associated with significant events or persons; embody the distinct characteristics of a particular period; possess high artistic value; or yield, or be likely to yield, important historic or prehistoric information.⁴¹

The regulations include a few different methods to add properties to the NR.⁴² However, the process often begins when private individuals, organizations, or local governments submit a nomination request to a SHPO.⁴³ Upon receipt of a nomination, the SHPO consults with local governments, notifies affected property owners of the intent to nominate a property, and solicits written comments on the significance of the property and whether it meets the NR evaluation criteria.⁴⁴ Property owners also have the opportunity to object to the listing.⁴⁵ If a private property owner, or majority of owners for a district or single property with multiple owners, object prior to the nomination, the nomination may not move forward, but the state may submit the nomination to NPS for a determination of eligibility.⁴⁶

A State Review Board then reviews the nomination forms and any comments, after which it determines whether the property meets the NR evaluation criteria and makes a recommendation to the SHPO to approve or disapprove the nomination.⁴⁷ The SHPO then evaluates the nomination and—if he or she concludes the documentation is procedurally and technically correct and meets NR evaluation criteria—submits them to the Keeper of the National Register of Historic Places (“Keeper”) at NPS.⁴⁸ Within 45 days of receipt the nomination becomes part of the NR unless the Keeper objects, an appeal is filed, or the private property owner (or majority of owners as discussed above) objects.⁴⁹

Designation does not impose any federal restrictions on property use for private owners, with the exception of projects receiving federal assistance.⁵⁰ However, listing may trigger state or local preservation laws that may impose restrictions.⁵¹ Concerns also persist regarding these designations due to potential for abuse. Some nominations generate fears that residents and neighborhood associations employ NR designations as a tool to block or delay development or use of land in their neighborhoods.⁵²

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* § 60.1.

⁴³ See § 60.11; Nat’l Park Serv., National Register of Historic Places Program: Frequently Asked Questions, <https://www.nps.gov/nr/faq.htm#nr> (last visited July 11, 2017).

⁴⁴ § 60.6(b)-(c)

⁴⁵ *Id.* § 60.6(b).

⁴⁶ *Id.* § 60.6(n).

⁴⁷ *Id.* § 60.6(j).

⁴⁸ *Id.* § 60.6(k).

⁴⁹ *Id.* § 60.6(r)

⁵⁰ See Nat’l Park Serv., *supra* note 43.

⁵¹ See *id.*

⁵² Joe Cortright, *Historic Preservation: NIMBYism for the Rich?*, STRONG TOWNS (June 14, 2017), <https://www.strongtowns.org/journal/2017/6/13/historic-preservation-nimbyism-for-the-rich>.

ACHP and Federal Undertakings

Of all NHPA provisions, Section 106 most profoundly impacts other federal agencies as well as individuals and businesses that interact with them. Prior to every proposed federal “undertaking,”⁵³ before the agency can approve any expenditures of federal funds or grant any license, that federal agency must take into account the effect of that undertaking on any “historic property.”⁵⁴ A historic property includes “any prehistoric or historic district, site, building, structure, or object included on, or *eligible for inclusion* on, the National Register”⁵⁵ The requirement that agencies consider “eligible” properties has generated uncertainty and drastically broadens the scope of the review.⁵⁶ By law, agencies must afford the ACHP the opportunity to comment on each undertaking.⁵⁷

The federal agency carrying out or approving the action must first determine whether that action has the potential to affect historic properties.⁵⁸ Throughout the process, the agency must consult with SHPOs and THPOs and work with them to identify any other parties entitled to serve as consulting parties.⁵⁹ The agency also invites the public and local governments to participate.⁶⁰ Subsequently, the agency must gather information to decide which properties within the area of potential effect are listed, or are eligible for listing, in the NR.⁶¹

If the agency identifies historic properties that may be affected, it must assess adverse effects.⁶² The agency then must consult with the SHPO/THPO and other consulting parties to develop a plan to avoid or mitigate these adverse effects.⁶³ The parties then execute a Memorandum of Agreement on measures the agency will take to mitigate or avoid adverse effects.⁶⁴ If the parties do not reach a resolution, the SHPO/THPO, or ACHP may terminate consultation.⁶⁵ In most cases when consultation is terminated, ACHP provides advisory

⁵³ The statute provides the following definition of undertaking: “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

- (A) those carried out by or on behalf of a Federal agency;
- (B) those carried out with Federal financial assistance;
- (C) those requiring a Federal permit license, or approval; and
- (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. 54 U.S.C § 300320 (2015).

⁵⁴ *Id.* § 306108.

⁵⁵ *Id.* § 300308 (emphasis added).

⁵⁶ See e.g., *Oversight Hearing on the National Historic Preservation Act: Hearing Before the Subcomm. on Nat’l Parks of the H. Comm. on Res.*, 109th Cong. 24 (2005) (statement of Michael Altschul, Sr., Vice President and General Counsel, CTIA, the Wireless Association).

⁵⁷ § 306108.

⁵⁸ 36 C.F.R. § 800.3(a) (2016).

⁵⁹ *Id.* § 800.3(f).

⁶⁰ *Id.* § 800.3(e), (f)(1).

⁶¹ *Id.* § 800.4(b)-(c).

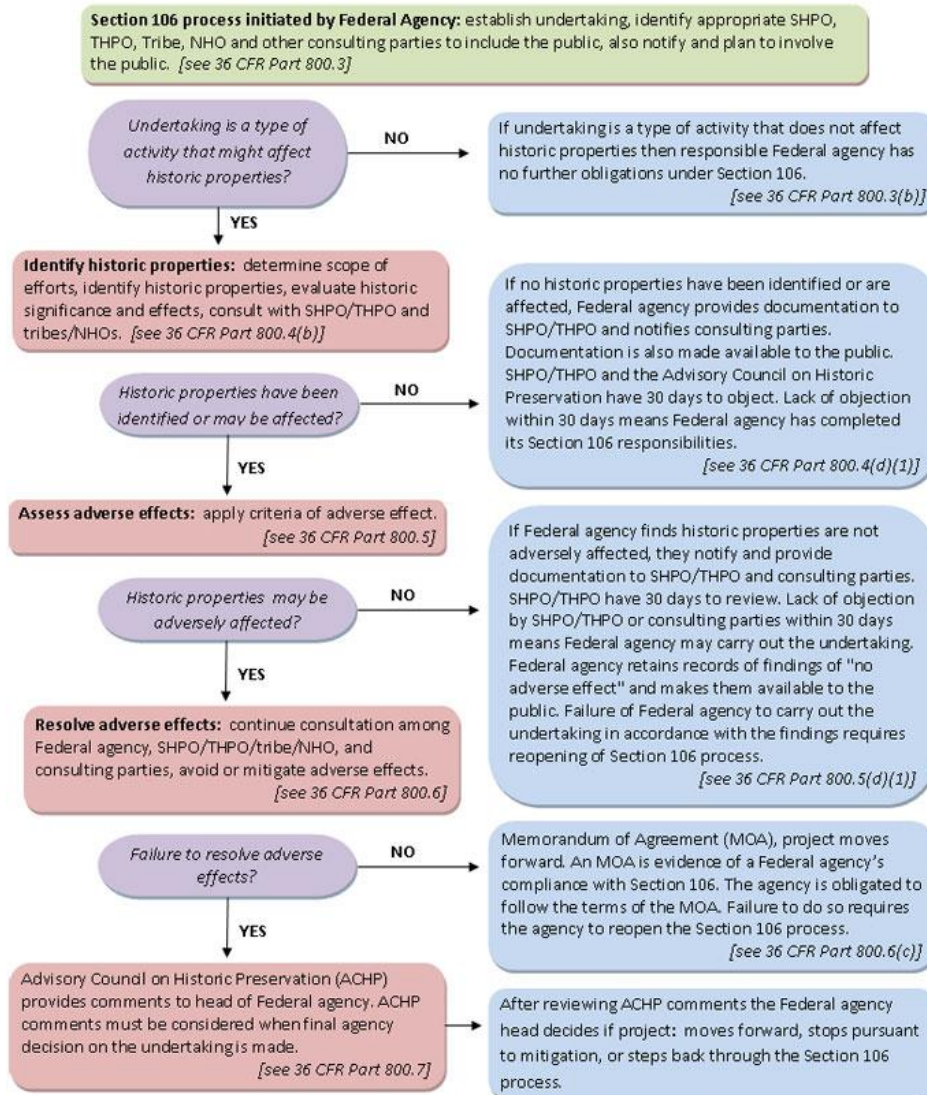
⁶² *Id.* § 800.5.

⁶³ *Id.* § 800.6

⁶⁴ *Id.* § 800.6(c).

⁶⁵ *Id.* § 800.7(a).

comments to the relevant agency's head.⁶⁶ The agency must consider these comments when making a final determination on whether to move forward with the project.⁶⁷



Section 106 Process
Source: NPS

⁶⁶ *Id.* § 800.7(c).

⁶⁷ *Id.* §800.7(c)(4).