

Committee on Natural Resources

Rob Bishop Chairman
Mark-Up Memorandum

January 8, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff
Subcommittee on Water, Power and Oceans (x5-8331)

Mark-Up: **H.R. 3133 (Rep. Mike Johnson R-LA)**, To amend the Marine Mammal Protection Act of 1972 to reduce unnecessary permitting delays by clarifying associated procedures to increase economic development and support coastal restoration programs, and for other purposes.
Wednesday, January 10, 2017; 1324 Longworth HOB

H.R. 3133, *SEA Act*

Summary of the Bill

H.R. 3133, the SEA Act, makes targeted, common sense updates to the Marine Mammal Protection Act of 1972 (MMPA, Public Law 92-522) to increase regulatory efficiency and remove duplicative permitting requirements under federal law. This provision was included in H.R. 4239, the SECURE American Energy Act, which was reported by the House Committee on Natural Resources in November 2017.¹

Cosponsors

Reps. Ralph Abraham (R-LA-5), Jeff Duncan (R-SC-3), Garret Graves (R-LA-6), Jody Hice (R-GA-10), Clay Higgins (R-LA-3), Barry Loudermilk (R-GA-11), Steven Palazzo (R-MS-4), and David Rouzer (R-NC-7).

Background

The MMPA established a moratorium on the “taking” of marine mammals in U.S. waters, as well as on importing marine mammals and marine mammal products.² 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.³ 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)

¹ H.R. 4239, *SECURE American Energy Act*, introduced by Rep. Steve Scalise Nov. 3, 2017, 115th Cong.

² Marine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1027 (1972)

³ *Id.* at 2

through the Fish and Wildlife Service (FWS) authority for the conservation and management of marine mammal species.⁴

Both the MMPA and the Endangered Species Act of 1973 (ESA, 16 U.S.C. 1531 et seq.) employ the concept of “take” to refer to prohibited activities.⁵ The MMPA defines “take” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”⁶ 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; the feeding or attempting to feed a marine mammal in the wild.”⁷

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.”⁸

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.⁹ 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.¹⁰

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.¹¹ 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.¹²

The MMPA does allow for the authorization of the taking of marine mammals incidental to activities if such action is expected to have only a negligible impact on the species. There are two types of authorizations that can be issued – a letter of authorization (LOA) and an incidental harassment authorization (IHA).¹³ A LOA is typically used for activities that may result in harassment for multiple years or that may result in serious injury or mortality of marine mammals and are valid for up to five years.¹⁴ An IHA is typically used for activities that may

⁴ Eugene H. Buck, CONG. RESEARCH SERV., RL30120, THE MARINE MAMMAL PROTECTION ACT: REAUTHORIZATION ISSUES 4(2007), available at <http://www.crs.gov/>

⁵ See Nat’l Marine Fisheries Serv., U.S. Dep’t of Commerce, Protected Resource Glossary, available at <http://www.nmfs.noaa.gov/pr/glossary.htm>

⁶ 16 U.S.C. 1362(13)

⁷ 50 C.F.R. 216.3 (2016)

⁸ Buck, *supra* note 3, at 36

⁹ 16 U.S.C. 1362(18); Buck, *supra* note 3, at 36

¹⁰ 16 U.S.C. 1362(18)(C)-(D)

¹¹ 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.

¹² *Id.* at 11

¹³ 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/>

¹⁴ *Id.* at 13

result in harassment only and are valid for one year.¹⁵ These authorizations are often issued for activities that produce underwater disturbances or sounds, such as coastal and habitat restoration, construction, military sonar exercises, and geophysical surveys for research and offshore energy exploration.¹⁶

While the MMPA provides an opportunity for people and organizations to partake in activities that may cause harassment to marine mammals, the process to obtain an incidental take authorization is known to be very burdensome and time consuming.¹⁷ In an effort to avoid stalled applications, the law includes statutory deadlines for federal agencies processing IHA applications. However, industry members have testified in front of the House Committee on Natural Resources that excessive delays continue, citing delays in excess of hundreds of days.¹⁸

In recent years, such bureaucratic delays have been inherent in the IHA permitting process. This led directly to poorly informed decisions when it comes to offshore natural resource management.¹⁹ In addition to a geological and geophysical permit from the Bureau of Ocean Energy Management (BOEM), applicants must also secure an IHA, which is reviewed and permitted by NMFS or the FWS.

Acoustic geological and geophysical testing uses mechanically generated sound waves to transit energy to the subsurface of the seafloor. The returning sound waves are captured by hydrophones, which record data of subsea geology and potential hydrocarbon reserves. These surveys are also conducted for research purposes, such as identifying earthquake fault zones. Due to the possibility that the sound generated by seismic testing may disturb marine mammals, an ITA is required for permitting in the Outer Continental Shelf Atlantic and Alaskan waters.²⁰ To date, there are no confirmed instances of harm or death to marine mammals, fish, or other marine life.²¹

A recently published GAO Report found that NMFS and FWS failed in the most basic tasks, such as accurately recording application dates and timelines. IHA applications sat in these

¹⁵ *Id.* at 13

¹⁶ *Id.* at 13

¹⁷ *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), available at https://naturalresources.house.gov/uploadedfiles/seidel_testimony.pdf.

¹⁸ *Examining the Impacts of Federal Natural Resources Laws Gone Astray, Part II*: Hearing before the Subcomm. On Oversight and Investigations of the H. Comm. on Natural Res., 115th Cong. (2017) (statement of Nikki Martin, International Association of Geophysical Contractors), available at https://naturalresources.house.gov/uploadedfiles/testimony_martin_7.18.17.pdf

¹⁹ *Examining the Impacts of Federal Natural Resources Laws Gone Astray, Part II*: Hearing before the Subcomm. On Oversight and Investigations of the H. Comm. on Natural Res., 115th Cong. (2017) (statement of Nikki Martin, International Association of Geophysical Contractors), available at https://naturalresources.house.gov/uploadedfiles/testimony_martin_7.18.17.pdf

²⁰ GOV'T ACCOUNTABILITY OFFICE, GAO-18-60, OFFSHORE SEISMIC SURVEYS: ADDITIONAL GUIDANCE NEEDED TO HELP ENSURE TIMELY REVIEWS (2017), p.12.

²¹ IAGC, Debunking Offshore Oil & Gas Exploration Myths: Seismic Surveys. Available at: http://www.iagc.org/uploads/4/5/0/7/45074397/iagc_debunking_offshore_oil_exploration_-_short_final_final__11.14.17.pdf

agencies, sometimes for years.²² Because oil and gas resource estimates are an integral part of effective natural resource management, it is necessary to maintain a careful and accurate accounting of our nation's resources. Federal agencies and companies rely directly on seismic information when making the policy and business decisions.

Delays under the IHA process have hampered seismic activity that supports utilization of our offshore resources. In addition, ESA-listed species recovery efforts have also been hampered or delayed by the current IHA process. During a 2013 Water, Power and Oceans Subcommittee hearing on marine mammal predation of ESA-listed salmon species in the Pacific Northwest, Mr. Norman, then-Regional Director of the Washington Department of Fish and Wildlife testified that: “[T]he conditions associated with the current requirements of Section 120 of the Marine Mammal Protection Act (MMPA) are challenging and expensive to implement, limited in scope, and legal challenges have slowed the progress in reducing impacts to salmon.”²³

Furthermore, a 2016 Federal Court of Appeals case revoked the U.S. Navy's authorization to use sonar for critical national security training due to conflicts with take requirements under the MMPA.²⁴

H.R. 3133, the SEA Act, directly addresses these delays by making targeted, common sense updates to the MMPA to increase regulatory efficiency and remove duplicative permitting requirements under federal law. These reforms support coastal habitat and species restoration, U.S. national security, and American energy independence. The provisions in H.R. 3133 achieve the goals set forth by the Administration to increase efficiency and effectiveness of federal regulations, especially pertaining to ways to better meet multiple statutory mandates and timelines.²⁵

Major Provisions/Analysis of H.R. 3133

Section 2 clarifies who may apply for IHA permits and eliminates several vague restrictions impeding the permit process. This section establishes pragmatic expectations for reporting on harassment of protected species. Further, the Secretary may not impose conditions on authorizations that substantially change the operations or scope of the activity described in the application.

²² GOV'T ACCOUNTABILITY OFFICE, GAO-18-60, OFFSHORE SEISMIC SURVEYS: ADDITIONAL GUIDANCE NEEDED TO HELP ENSURE TIMELY REVIEWS (2017), p.32.

²³ Legislative Hearing on H.R. 1308, Before the Subcomm. on Water and Power of the H. Comm. on Natural Res 113th Cong. (2013) (statement of Guy Norman, Regional Director of Washington Department of Fish and Wildlife), available at: <https://naturalresources.house.gov/uploadedfiles/normantestimony06-13-13.pdf>

²⁴ Conservation Council for Hawaii, et al., v. National Marine Fisheries Service, et al. U.S. District Court for the District of Hawaii, filed March 31, 2015, available at: https://www.scribd.com/document/260644325/2015-3-31-Amended-Order?irgwc=1&content=10079&campaign=Skimbit%2C%20Ltd.&ad_group=38395X1559467X17235c8f19f8459160a5f80515dcb78e&keyword=ft750noi&source=impactradius&medium=affiliate

²⁵ *Legislative Hearing on H.R. 200*, Before the Subcomm on Water, Power and Oceans of the H. Comm. on Natural Res 115th Cong. (2017) (statement of Chris Oliver, Assistant Administrator for the National Marine Fisheries Service, Dept. of Commerce), available at: https://naturalresources.house.gov/uploadedfiles/testimony_oliver.pdf

Furthermore, Section 2 establishes firm timelines for approval or rejection of IHA applications. The Secretary must either accept applications as complete within 45 days of receipt, or request any additional information from the applicant within 15 days of receipt and issue approval of applications as complete within 30 days of receipt of the additional information.

Once the Secretary has accepted an application as complete, within 30 days, the Secretary must either approve the application or deny it with written justification. If the Secretary fails to respond to an IHA request within the established deadlines, the application is considered completed. If the Secretary has not issued a determination on an application within 120 days of it being considered complete, the authorization is automatically issued consistent with the terms of the application. Authorization holders may apply for a one-year extension of the authorization so long as there is no substantial change in operations of the activity governed by the authorization.

Section 3 eliminates redundant regulatory processes between MMPA and the Endangered Species Act. Permits issued for incidental take of marine mammals pursuant to MMPA will be considered to satisfy the requirements of Section 9 of the Endangered Species Act.

Cost

The Congressional Budget Office has not yet conducted a cost analysis of H.R. 3133.

Administration Position

The Administration hasn't taken an official stance, but during testimony before the Committee in the 115th Congress indicated support for the goals to achieve efficiency and effectiveness of federal laws such as the MMPA.²⁶

Anticipated Amendments

None anticipated.

Effect on Current Law (Ramseyer)

See H.R. 3133's effect on current law [here](#).

²⁶ *Legislative Hearing on H.R. 200*, Before the Subcomm on Water, Power and Oceans of the H. Comm. on Natural Res 115th Cong. (2017) (statement of Chris Oliver, Assistant Administrator for the National Marine Fisheries Service, Dept. of Commerce), available at: https://naturalresources.house.gov/uploadedfiles/testimony_oliver.pdf