

STREAMLINING ENVIRONMENTAL APPROVALS ACT OF
2017

NOVEMBER 16, 2018.—Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. BISHOP of Utah, from the Committee on Natural Resources,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3133]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3133) 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, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 3133 is 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.

BACKGROUND AND NEED FOR LEGISLATION

The Marine Mammal Protection Act of 1972 (MMPA, 16 U.S.C. 1361 et seq.) 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 Administration’s (NOAA) National Marine Fisheries Service (NMFS) and the Secretary of the Interior through the Fish and Wildlife Service (FWS) authority for the conservation and management of marine mammal species.³

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.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; [or] the 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

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

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).¹² A LOA is typically used for activities that may result in harassment for

¹ Marine Mammal Protection Act, Public Law 92–522, 86 Stat. 1027 (1972).

² *Id.* at 2.

³ Eugene H. Buck, CONG. RESEARCH SERV., RL30120, THE MARINE MAMMAL PROTECTION ACT: REAUTHORIZATION ISSUES 4(2007), available at <http://www.crs.gov/>.

⁴ 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>.

⁵ 16 U.S.C. 1362(13).

⁶ 50 C.F.R. 216.3 (2016).

⁷ Buck, *supra* note 3, at 36.

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

⁹ 16 U.S.C. 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.* at 11.

¹² 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/>.

multiple years or that may result in serious injury or mortality of marine mammals and are valid for up to five years.¹³ An IHA is typically used for activities that may result in harassment only and are valid for one year.¹⁴ 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.¹⁵

While the MMPA provides an opportunity for people and organizations to undertake 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.¹⁶ To avoid stalled applications, the law includes statutory deadlines for federal agencies processing IHA applications. However, industry members have testified before the Committee on Natural Resources that excessive periods of review continue, citing delays in excess of hundreds of days.¹⁷

In recent years, such bureaucratic delays have been inherent in the IHA permitting process. This led directly to poorly-informed decisions regarding offshore natural resource management.¹⁸ In addition to a geological and geophysical permit from the Bureau of Ocean Energy Management (BOEM), applicants for oil and gas exploration activities on the U.S. outer Continental Shelf 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 transmit 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.¹⁹ To date, there are no confirmed instances of harm or death to marine mammals, fish, or other marine life from these permitted activities.²⁰

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 agencies,

¹³*Id.* at 13.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*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.

¹⁷*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.

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.

¹⁹GOV'T ACCOUNTABILITY OFFICE, GAO-18-60, OFFSHORE SEISMIC SURVEYS: ADDITIONAL GUIDANCE NEEDED TO HELP ENSURE TIMELY REVIEWS (2017), p.12.

²⁰IAGC, 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.

sometimes for years.²¹ 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.

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.”²²

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.²³

H.R. 3133, the Streamlining Environmental Approvals Act of 2017 (the SEA Act of 2017), 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 also achieve the goals set forth by the Administration to increase efficiency and effectiveness of federal regulations, and particularly in simplifying compliance with multiple overlapping and often contradictory statutory mandates.²⁴

The text of H.R. 3133 was included in H.R. 4239, the SECURE American Energy Act, ordered favorably reported by the Committee on Natural Resources on November 8, 2017.

COMMITTEE ACTION

H.R. 3133 was introduced on June 29, 2017, by Congressman Mike Johnson (R-LA). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Water, Powers and Oceans. On January 10, 2018, the Natural Resources Committee met to consider the bill. The Subcommittee was discharged by unanimous consent. Congresswoman Nanette

²¹ GOV’T ACCOUNTABILITY OFFICE, GAO-18-60, OFFSHORE SEISMIC SURVEYS: ADDITIONAL GUIDANCE NEEDED TO HELP ENSURE TIMELY REVIEWS (2017), p.32.

²² 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>.

²³ 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&campaignSkimbit%2C%20Ltd.&ad_group=38395X1559467X17235c8f19f8459160a5f80515dcb78e&keyword=fl750noi&source=impactradius&medium=affiliate.

²⁴ 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.

Diaz Barragán (D-CA) offered an amendment designated 002; it was not adopted by a roll call vote of 17 ayes to 20 noes, as follows:

Committee on Natural Resources
U.S. House of Representatives
115th Congress

Date: 01.10.18

Recorded Vote #:1

Meeting on / Amendment on: FC Mark Up on Barragan_002 to H.R. 3133

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Bishop, UT, Chairman		X		Mr. Cook, CA		X	
<i>Mr. Grijalva, AZ, Ranking Member</i>	X			<i>Mr. Soto, FL</i>	X		
Mr. Young, AK, Chairman Emeritus		X		Mr. Westerman, AR		X	
<i>Mrs. Napolitano, CA</i>	X			<i>Mr. McEachin, VA</i>	X		
Mr. Gohmert, TX, Vice Chairman				Mr. Graves, LA		X	
<i>Ms. Bordallo, Guam</i>	X			<i>Mr. Brown, MD</i>	X		
Mr. Lamborn, CO		X		Mr. Hice, GA		X	
<i>Mr. Costa, CA</i>	X			<i>Mr. Clay, MO</i>	X		
Mr. Wittman, VA				Mrs. Radewagen, AS			
<i>Mr. Sablan, CNMI</i>	X			<i>Mr. Gomez, CA</i>	X		
Mr. McClintock, CA		X		Mr. LaHood, IL		X	
<i>Ms. Tsongas, MA</i>	X			Mr. Webster, FL		X	
Mr. Pearce, NM		X		Mr. Bergman, MI		X	
<i>Mr. Huffman, CA</i>	X			Ms. Cheney, WY		X	
Mr. Thompson, PA		X		Mr. Johnson, LA		X	
<i>Mr. Lowenthal, CA</i>	X			Ms. González-Colón, PR			
Mr. Gosar, AZ		X		Mr. Gianforte, MT		X	
<i>Mr. Beyer, VA</i>	X						
Mr. Labrador, ID							
<i>Mrs. Torres, CA</i>	X						
Mr. Tipton, CO		X					
<i>Mr. Gallego, AZ</i>	X						
Mr. LaMalfa, CA		X					
<i>Ms. Hanabusa, HI</i>							
Mr. Denham, CA		X					
<i>Ms. Barragán, CA</i>	X			TOTAL:	17	20	

Congressman Donald S. Beyer, Jr. (D-VA) offered an amendment designated 003; it was not adopted by a roll call vote of 17 ayes to 19 noes, as follows:

Committee on Natural Resources
U.S. House of Representatives
115th Congress

Date: 01.10.18

Recorded Vote #: 2

Meeting on / Amendment on: FC Mark Up on Beyer_003 to HR 3133

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
Mr. Bishop, UT, Chairman		X		Mr. Cook, CA		X	
<i>Mr. Grijalva, AZ, Ranking Member</i>	X			<i>Mr. Soto, FL</i>	X		
Mr. Young, AK, Chairman Emeritus		X		Mr. Westerman, AR		X	
<i>Mrs. Napolitano, CA</i>	X			<i>Mr. McEachin, VA</i>	X		
Mr. Gohmert, TX, Vice Chairman				Mr. Graves, LA		X	
<i>Ms. Bordallo, Guam</i>	X			<i>Mr. Brown, MD</i>	X		
Mr. Lamborn, CO		X		Mr. Hice, GA		X	
<i>Mr. Costa, CA</i>	X			<i>Mr. Clay, MO</i>	X		
Mr. Wittman, VA				Mrs. Radewagen, AS			
<i>Mr. Sablan, CNMI</i>	X			<i>Mr. Gomez, CA</i>	X		
Mr. McClintock, CA		X		Mr. LaHood, IL		X	
<i>Ms. Tsongas, MA</i>	X			Mr. Webster, FL		X	
Mr. Pearce, NM		X		Mr. Bergman, MI		X	
<i>Mr. Huffman, CA</i>	X			Ms. Cheney, WY		X	
Mr. Thompson, PA		X		Mr. Johnson, LA		X	
<i>Mr. Lowenthal, CA</i>	X			Ms. González-Colón, PR			
Mr. Gosar, AZ		X		Mr. Gianforte, MT		X	
<i>Mr. Beyer, VA</i>	X						
Mr. Labrador, ID							
<i>Mrs. Torres, CA</i>	X						
Mr. Tipton, CO		X					
<i>Mr. Gallego, AZ</i>	X						
Mr. LaMalfa, CA		X					
<i>Ms. Hanabusa, HI</i>							
Mr. Denham, CA							
<i>Ms. Barragán, CA</i>	X			TOTAL:	17	19	

Congresswoman Madeleine Z. Bordallo (D–GU) offered an amendment designated 004; it was not adopted by voice vote. No additional amendments were offered and the bill was ordered favorably reported to the House of Representatives by voice vote.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation and the Congressional Budget Act of 1974. With respect to the requirements of clause 3(c)(2) and (3) of rule XIII of the Rules of the House of Representatives and sections 308(a) and 402 of the Congressional Budget Act of 1974, the Committee has received the enclosed cost estimate for the bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 8, 2018.

Hon. ROB BISHOP,
*Chairman, Committee on Natural Resources,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3133, SEA Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Robert Reese.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 3133—SEA Act of 2017

H.R. 3133 would amend the Marine Mammal Protection Act of 1972 to expand the number of entities that may apply for permits to conduct research or build structures in offshore areas that could incidentally affect marine mammals. The bill would create timelines for the approval or rejection of such permit applications and would clarify that permits issued under the Marine Mammal Protection Act would satisfy similar permitting requirements under the Endangered Species Act of 1973.

Using information from the National Oceanic and Atmospheric Administration, CBO estimates that the costs associated with reviewing permit applications under the bill would not be significant.

Enacting H.R. 3133 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 3133 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 3133 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Robert Reese. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

2. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is 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.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

COMPLIANCE WITH H. RES. 5

Directed Rule Making. This bill does not contain any directed rule makings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

MARINE MAMMAL PROTECTION ACT OF 1972

* * * * *

TITLE I—CONSERVATION AND PROTECTION OF MARINE MAMMALS

MORATORIUM AND EXCEPTIONS

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 per-

mit 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, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock, or for importation of polar bear parts (other than internal organs) taken in sport hunts in Canada. Such permits, except permits issued under section 104(c)(5), may be issued if the taking or 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. The Commission and Committee shall recommend any proposed taking or importation, other than importation under section 104(c)(5), which is consistent with the purposes and policies of section 2 of this Act. If the Secretary issues such a permit for importation, the Secretary shall issue to the importer concerned a certificate to that effect 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, or in lieu of such permits, authorizations may be granted therefor under section 118, subject to regulations prescribed under that section by the Secretary without regard to section 103. Such authorizations may be granted under title III with respect to purse seine fishing for yellowfin tuna in the eastern tropical Pacific Ocean, subject to regulations prescribed under that title by the Secretary without regard to 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. 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 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 documentary evidence that—

(i)(I) the tuna or products therefrom were not banned from importation under this paragraph before the effective date of section 4 of the International Dolphin Conservation Program Act; or

(II) the tuna or products therefrom were harvested after the effective date of section 4 of the International Dolphin Conservation Program Act by vessels of a nation which participates in the International Dolphin Conservation Program, and such harvesting nation is either a member of the Inter-American Tropical Tuna Commission or has initiated (and within 6 months thereafter completed) all steps required of applicant nations, in accordance with article V, paragraph 3 of the Convention establishing the Inter-American Tropical Tuna Commission, to become a member of that organization;

(ii) such nation is meeting the obligations of the International Dolphin Conservation Program and the obligations of membership in the Inter-American Tropical Tuna Commission, including all financial obligations; and

(iii) the total dolphin mortality limits, and per-stock per-year dolphin mortality limits permitted for that nation's vessels under the International Dolphin Conservation Program do not exceed the limits determined for 1997, or for any year thereafter, consistent with the objective of progressively reducing dolphin mortality to a level approaching zero through the setting of annual limits and the goal of eliminating dolphin mortality, and requirements of the International Dolphin Conservation Program;

(C) shall not accept such documentary evidence if—

(i) the government of the harvesting nation does not provide directly or authorize the Inter-American Tropical Tuna Commission to release complete and accurate information to the Secretary in a timely manner—

(I) to allow determination of compliance with the International Dolphin Conservation Program; and

(II) for the purposes of tracking and verifying compliance with the minimum requirements established by the Secretary in regulations promulgated under subsection (f) of the Dolphin Protection Consumer Information Act (16 U.S.C. 1385(f)); or

(ii) after taking into consideration such information, findings of the Inter-American Tropical Tuna Commission, and any other relevant information, including information that a nation is consistently failing to take enforcement actions on violations which diminish the effectiveness of the International Dolphin Conservation Program, the Secretary, in consultation with the Secretary of State, finds that the harvesting nation is

not in compliance with the International Dolphin Conservation Program.

(D) 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);

(E) 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; and

(F)(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 (F), 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.

(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, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock as provided for in paragraph (1) of this subsection, or as provided for under paragraph (5) 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.

(4)(A) Except as provided in subparagraphs (B) and (C), the provisions of this Act shall not apply to the use of measures—

- (i) by the owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch;
- (ii) by the owner of other private property, or an agent, bailee, or employee of such owner, to deter a marine mammal from damaging private property;
- (iii) by any person, to deter a marine mammal from endangering personal safety; or
- (iv) by a government employee, to deter a marine mammal from damaging public property,

so long as such measures do not result in the death or serious injury of a marine mammal.

(B) The Secretary shall, through consultation with appropriate experts, and after notice and opportunity for public comment, publish in the Federal Register a list of guidelines for use in safely deterring marine mammals. In the case of marine mammals listed as endangered species or threatened species under the Endangered Species Act of 1973, the Secretary shall recommend specific measures which may be used to non-lethally deter marine mammals. Actions to deter marine mammals consistent with such guidelines or specific measures shall not be a violation of this Act.

(C) If the Secretary determines, using the best scientific information available, that certain forms of deterrence have a significant adverse effect on marine mammals, the Secretary may prohibit such deterrent methods, after notice and opportunity for public comment, through regulation under this Act.

(D) The authority to deter marine mammals pursuant to subparagraph (A) applies to all marine mammals, including all stocks designated as depleted under this Act.

(5)(A)(i) 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 popu-

lation 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

(aa) 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

(bb) requirements pertaining to the monitoring and reporting of such taking.

(ii) For a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), a determination of “least practicable adverse impact on such species or stock” under clause (i)(II)(aa) shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Before making the required determination, the Secretary shall consult with the Department of Defense regarding personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

(iii) Notwithstanding clause (i), for any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), the Secretary shall publish the notice required by such clause only in the Federal Register.

(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.

(D)(i) Upon request therefor by [citizens of the United States] *persons* who engage in a specified activity (other than commercial fishing) [within a specific geographic region], the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not intentional, taking by harassment [of small numbers] of marine mammals of a species or population stock by [such citizens] *such persons* while engaging in that activity [within that region] if the Secretary finds that such harassment during each period concerned—

(I) will have a negligible impact on such species or stock, and

(II) 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 pursuant to a cooperative agreement under section 119.

(ii) The authorization for such activity shall prescribe, where applicable—

(I) permissible methods of taking by harassment pursuant to such activity[, and other means of effecting the least practicable 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 taking for subsistence uses pursuant to subsection (b) or section 109(f) or pursuant to a cooperative agreement under section 119,

(II) the measures that the Secretary determines are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for taking for subsistence uses pursuant to subsection (b) or section 109(f) or pursuant to a cooperative agreement under section 119, and

(III) [requirements pertaining to the monitoring and reporting of such taking by harassment, including] *efficient and practical requirements pertaining to the monitoring of such taking by harassment while the activity is being conducted and the reporting of such taking, including, as the Secretary determines necessary, requirements for the independent peer review of proposed monitoring plans or other research proposals where the proposed activity may affect the availability of a species or stock for taking for subsistence uses pursuant to subsection (b) or section 109(f) or pursuant to a cooperative agreement under section 119.*

Any condition imposed pursuant to subclause (I), (II), or (III) may not result in more than a minor change to the specified activity and may not alter the basic design, location, scope, duration, or timing of the specified activity.

(iii) The Secretary shall publish a proposed authorization not later than 45 days after [receiving an application under this subparagraph] *an application is accepted or required to be considered complete under subclause (I)(aa), (II)(aa), or (IV) of*

clause (viii), as applicable, and request public comment through notice in the Federal Register, newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication. Not later than 45 days after the close of the public comment period, if the Secretary makes the findings set forth in clause (i), the Secretary shall issue an authorization with appropriate conditions to meet the requirements of clause (ii).

(iv) The Secretary shall modify, suspend, or revoke an authorization if the Secretary finds that the provisions of clauses (i) or (ii) are not being met.

(v) A person conducting an activity for which an authorization has been granted under this subparagraph shall not be subject to the penalties of this Act for taking by harassment that occurs in compliance with such authorization.

*(vi) For a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), [a determination of “least practicable adverse impact on such species or stock” under clause (i)(I)] *conditions imposed under subclause (I), (II), or (III) of clause (i)* shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. Before making the required determination, the Secretary shall consult with the Department of Defense regarding personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.*

(vii) Notwithstanding clause (iii), for any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107–314; 16 U.S.C. 703 note), the Secretary shall publish the notice required by such clause only in the Federal Register.

(viii)(I) The Secretary shall—

(aa) accept as complete a written request for authorization under this subparagraph for incidental taking described in clause (i), by not later than 45 days after the date of submission of the request; or

(bb) provide to the requester, by not later than 15 days after the date of submission of the request, a written notice describing any additional information required to complete the request.

(II) If the Secretary provides notice under subclause (I)(bb), the Secretary shall, by not later than 30 days after the date of submission of the additional information described in the notice—

(aa) accept the written request for authorization under this subparagraph for incidental taking described in clause (i); or

(bb) deny the request and provide the requester a written explanation of the reasons for the denial.

(III) The Secretary may not make a second request for information, request that the requester withdraw and resubmit the request, or otherwise delay a decision on the request.

(IV) If the Secretary fails to respond to a request for authorization under this subparagraph in the manner provided in subclause (I) or (II), the request shall be considered to be complete.

(ix)(I) At least 90 days before the expiration of any authorization issued under this subparagraph, the holder of such authorization

may apply for a one-year extension of such authorization. The Secretary shall grant such extension within 14 days after the date of such request on the same terms and without further review if there has been no substantial change in the activity carried out under such authorization nor in the status of the marine mammal species or stock, as applicable, as reported in the final annual stock assessment reports for such species or stock.

(II) In subclause (I) the term “substantial change” means a change that prevents the Secretary from making the required findings to issue an authorization under clause (i) with respect to such species or stock.

(III) The Secretary shall notify the applicant of such substantial changes with specificity and in writing within 14 days after the applicant’s submittal of the extension request.

(x) If the Secretary fails to make the required findings and, as appropriate, issue the authorization within 120 days after the application is accepted or required to be considered complete under subclause (I)(aa), (II)(aa), or (III) of clause (viii), as applicable, the authorization is deemed to have been issued on the terms stated in the application and without further process or restrictions under this Act.

(xi) Any taking of a marine mammal in compliance with an authorization under this subparagraph is exempt from the prohibition on taking in section 9 of the Endangered Species Act of 1973 (16 U.S.C. 1538). Any Federal agency authorizing, funding, or carrying out an action that results in such taking, and any agency action authorizing such taking, is exempt from the requirement to consult regarding potential impacts to marine mammal species or designated critical habitat under section 7(a)(2) of such Act (16 U.S.C. 1536(a)(2)).

(E)(i) During any period of up to 3 consecutive years, the Secretary shall allow the incidental, but not the intentional, taking by persons using vessels of the United States or 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)), while engaging in commercial fishing operations, of marine mammals from a species or stock designated as depleted because of its listing as an endangered species or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) if the Secretary, after notice and opportunity for public comment, determines that—

(I) the incidental mortality and serious injury from commercial fisheries will have a negligible impact on such species or stock;

(II) a recovery plan has been developed or is being developed for such species or stock pursuant to the Endangered Species Act of 1973; and

(III) where required under section 118, a monitoring program is established under subsection (d) of such section, vessels engaged in such fisheries are registered in accordance with such section, and a take reduction plan has been developed or is being developed for such species or stock.

(ii) Upon a determination by the Secretary that the requirements of clause (i) have been met, the Secretary shall publish

in the Federal Register a list of those fisheries for which such determination was made, and, for vessels required to register under section 118, shall issue an appropriate permit for each authorization granted under such section to vessels to which this paragraph applies. Vessels engaged in a fishery included in the notice published by the Secretary under this clause which are not required to register under section 118 shall not be subject to the penalties of this Act for the incidental taking of marine mammals to which this paragraph applies, so long as the owner or master of such vessel reports any incidental mortality or injury of such marine mammals to the Secretary in accordance with section 118.

(iii) If, during the course of the commercial fishing season, the Secretary determines that the level of incidental mortality or serious injury from commercial fisheries for which a determination was made under clause (i) has resulted or is likely to result in an impact that is more than negligible on the endangered or threatened species or stock, the Secretary shall use the emergency authority granted under section 118 to protect such species or stock, and may modify any permit granted under this paragraph as necessary.

(iv) The Secretary may suspend for a time certain or revoke a permit granted under this subparagraph only if the Secretary determines that the conditions or limitations set forth in such permit are not being complied with. The Secretary may amend or modify, after notice and opportunity for public comment, the list of fisheries published under clause (ii) whenever the Secretary determines there has been a significant change in the information or conditions used to determine such list.

(v) Sections 103 and 104 shall not apply to the taking of marine mammals under the authority of this subparagraph.

(vi) This subparagraph shall not govern the incidental taking of California sea otters and shall not be deemed to amend or repeal the Act of November 7, 1986 (Public Law 99-625; 100 Stat. 3500).

(F) Notwithstanding the provisions of this subsection, any authorization affecting a military readiness activity (as defined in section 315(f) of Public Law 107-314; 16 U.S.C. 703 note) shall not be subject to the following requirements:

(i) In subparagraph (A), "within a specified geographical region" and "within that region of small numbers".

(ii) In subparagraph (B), "within a specified geographical region" and "within one or more regions".

(iii) In subparagraph (D), "within a specific geographic region", "of small numbers", and "within that region".

(6)(A) A marine mammal product may be imported into the United States if the product—

(i) was legally possessed and exported by any citizen of the United States in conjunction with travel outside the United States, provided that the product is imported into the United States by the same person upon the termination of travel;

(ii) was acquired outside of the United States as part of a cultural exchange by an Indian, Aleut, or Eskimo residing in Alaska; or

- (iii) is owned by a Native inhabitant of Russia, Canada, or Greenland and is imported for noncommercial purposes in conjunction with travel within the United States or as part of a cultural exchange with an Indian, Aleut, or Eskimo residing in Alaska.
- (B) For the purposes of this paragraph, the term—
- (i) “Native inhabitant of Russia, Canada, or Greenland” means a person residing in Russia, Canada, or Greenland who is related by blood, is a member of the same clan or ethnological grouping, or shares a common heritage with an Indian, Aleut, or Eskimo residing in Alaska; and
 - (ii) “cultural exchange” means the sharing or exchange of ideas, information, gifts, clothing, or handicrafts between an Indian, Aleut, or Eskimo residing in Alaska and a Native inhabitant of Russia, Canada, or Greenland, including rendering of raw marine mammal parts as part of such exchange into clothing or handicrafts through carving, painting, sewing, or decorating.

(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

(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. In promulgating any regulation or making any assessment pursuant to a hearing or proceeding under this subsection or section 117(b)(2), or in making any determination of depletion under this subsection or finding regarding unmitigable adverse im-

pacts under subsection (a)(5) that affects stocks or persons to which this subsection applies, the Secretary shall be responsible for demonstrating that such regulation, assessment, determination, or finding is supported by substantial evidence on the basis of the record as a whole. The preceding sentence shall only be applicable in an action brought by one or more Alaska Native organizations representing persons to which this subsection applies.

(c) It shall not be a violation of this Act to take a marine mammal if such taking is imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported to the Secretary within 48 hours. The Secretary may seize and dispose of any carcass.

(d) GOOD SAMARITAN EXEMPTION.—It shall not be a violation of this Act to take a marine mammal if—

(1) such taking is imminently necessary to avoid serious injury, additional injury, or death to a marine mammal entangled in fishing gear or debris;

(2) reasonable care is taken to ensure the safe release of the marine mammal, taking into consideration the equipment, expertise, and conditions at hand;

(3) reasonable care is exercised to prevent any further injury to the marine mammal; and

(4) such taking is reported to the Secretary within 48 hours.

(e) ACT NOT TO APPLY TO INCIDENTAL TAKINGS BY UNITED STATES CITIZENS EMPLOYED ON FOREIGN VESSELS OUTSIDE THE UNITED STATES EEZ.—The provisions of this Act shall not apply to a citizen of the United States who incidentally takes any marine mammal during fishing operations outside the United States exclusive economic zone (as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802)) when employed on a foreign fishing vessel of a harvesting nation which is in compliance with the International Dolphin Conservation Program.

(f) EXEMPTION OF ACTIONS NECESSARY FOR NATIONAL DEFENSE.—(1) The Secretary of Defense, after conferring with the Secretary of Commerce, the Secretary of the Interior, or both, as appropriate, may exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of this Act, if the Secretary determines that it is necessary for national defense.

(2) An exemption granted under this subsection—

(A) subject to subparagraph (B), shall be effective for a period specified by the Secretary of Defense; and

(B) shall not be effective for more than 2 years.

(3)(A) The Secretary of Defense may issue additional exemptions under this subsection for the same action or category of actions, after—

(i) conferring with the Secretary of Commerce, the Secretary of the Interior, or both as appropriate; and

(ii) making a new determination that the additional exemption is necessary for national defense.

(B) Each additional exemption under this paragraph shall be effective for a period specified by the Secretary of Defense, of not more than 2 years.

(4) Not later than 30 days after issuing an exemption under paragraph (1) or an additional exemption under paragraph (3), the Secretary of Defense shall submit to the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate notice describing the exemption and the reasons therefor. The notice may be provided in classified form if the Secretary of Defense determines that use of the classified form is necessary for reasons of national security.

* * * * *

DISSENTING VIEWS

H.R. 3133 would weaken key elements of the Marine Mammal Protection Act (MMPA). We oppose this bill because it provides a free pass to the oil and gas industry at the risk of marine mammals, coastal economies, and healthy oceans.

Congress first enacted the MMPA to protect all marine mammals in response to declines caused by human activities, and it has worked successfully for over 40 years. The MMPA ensures that activities that may result in incidental harm or take of marine mammals are thoroughly reviewed, rather than permitted through the expedited and inadequate process proposed by this bill. Activities such as seismic airgun testing used for oil and gas exploration, offshore drilling, sonar, and geophysical surveys can all affect marine mammals. While the Majority falsely claims that these activities have not killed any marine mammals, the best available science shows there can be longterm negative impacts on several marine mammal species.

This bill would undermine critical protections under the MMPA by striking the conditions required for permitted activities. It would allow for unmitigated incidental harm, that is, without the current safeguards that would allow for the “least practicable impact on such species or stock,” among other things. It would further limit mitigation for any incidental losses and requirements for monitoring. These legislative changes would allow industry to continue their activities with oversight of their impacts only if it was “efficient and practical.” Lastly, H.R. 3133 would waive requirements for take and consultation under the Endangered Species Act (ESA) for any threatened or endangered marine mammals. The ESA has been critical to the recovery of several populations of marine mammals and is needed to protect other species from extinction.

Democratic amendments to the bill represented the broad opposition to offshore activities that would endanger marine mammals and coastal communities. Representatives Nanette Diaz Barragán (D, CA) and Donald S. Beyer (D, VA) offered amendments that would protect Pacific and Atlantic coastal communities, respectively, from the harmful impacts of this bill. Representative Madeleine Bordallo (D, GU) offered an amendment that would have excluded the Gulf of Mexico from H.R. 3133 in order to protect offshore and near-shore marine mammal populations in the Gulf of Mexico, which are still recovering from the severe impacts of the Deepwater Horizon oil spill. All three of these amendments were rejected by the majority.

For the reasons stated above, we oppose this bill because it would significantly weaken the MMPA, a bedrock environmental law, and cause great harm to marine mammal populations.

RAÚL M. GRIJALVA,
Ranking Member.

MADELEINE BORDALLO.

DONALD S. BEYER, JR.

GRACE F. NAPOLITANO.

JARED HUFFMAN.

NANETTE DIAZ BARRAGÁN.

