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*Before the
Subcommittee on Readiness and Management Support
Senate Armed Services Committee
April 1, 2003*

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present our views on provisions in the National Defense Authorization Act for Fiscal Year 2004 that would amend the Marine Mammal Protection Act (MMPA). My name is Nina M. Young; I am the Director of Marine Wildlife Conservation for The Ocean Conservancy.

The Ocean Conservancy (TOC) strives to be the world's foremost advocate for the oceans. Through science-based advocacy, research, and public education, we inform, inspire, and empower people to speak and act for the oceans. TOC is the largest and oldest nonprofit conservation organization dedicated solely to protecting the marine environment. Headquartered in Washington, D.C., TOC has regional offices in Alaska, California, Florida, and Maine.

I. SUMMARY STATEMENT

The MMPA is our nation's leading instrument for the conservation of whales, dolphins, sea otters, seals, sea lions, polar bears, and walrus. Although we are sensitive to the issue of military readiness; we do not believe that the Department of Defense has demonstrated that the proposed changes to the MMPA within the National Defense Authorization Act for Fiscal Year 2004 are necessary or even that the Defense Department has exhausted all administrative remedies available to it under existing law.

The Department of Defense proposes to modify the MMPA's definition of harassment, amend its incidental take authorization process, and create a separate broad categorical exemption for military readiness activities. The proposed changes in the definition of harassment and changes in the incidental take authorization process for military readiness would severely undermine the precautionary nature of the Act, remove key conservation elements that restrict the scope of the incidental take to small numbers of marine mammals within a geographic region, and significantly raise the threshold that triggers the Department of Defense's obligation to secure authorization to conduct activities that have the potential to harass marine mammals. The proposed definition and incidental take authorization would not only increase injuries and deaths of marine mammals, but also diminish transparency, result in a loss of scientific research and mitigation measures, require federal agencies to make difficult, if not impossible, scientific judgments about whether a given activity is subject to the Act's permitting and mitigation requirements, and impair enforcement of the Act. The end result would be that many military readiness activities would either be exempt outright or could evade the Act's requirements by relying upon the uncertainty and ambiguity created by this new language.

Since 1994, when the MMPA was last amended, the Department of Defense has applied for over twenty incidental take and harassment authorizations. None of these applications has been denied, and in general they have been issued within the expected or required timeframes. The Department of Defense has failed to show that the existing incidental take process is overly burdensome, let alone that the proposed statutory changes are needed. To the contrary, it appears that the program is functioning much as Congress intended. Rather than amend the statute, we believe that improved coordination and advanced planning may be the most expedient way to achieve both marine mammal conservation and improve efficiency in the issuance of permits for military readiness activities.

To add insult to injury, the proposed exemption for national defense effectively creates an escape clause which allows the Defense Department to bypass the incidental take permitting process altogether. Moreover, this exemption is not even limited to the incidental take permitting process. As written, it authorizes the Secretary of Defense to exempt “any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement” of the MMPA for reasons of national defense for a potentially unlimited number of successive two-year periods. The Department of Defense has failed to demonstrate that an irreconcilable conflict exists within the incidental take authorization or other provisions of the MMPA or that the flexibility currently provided under the Armed Forces Code is insufficient to merit such a comprehensive and wide-ranging exemption—one that could render the MMPA’s conservation goals and mandates virtually meaningless.

Given the significant risks of changing these provisions in the MMPA, The Ocean Conservancy and other interest groups should be given the opportunity to work constructively with the committees of jurisdiction and the agencies to address the concerns of all parties. Adopting significantly flawed changes to the harassment definition and incidental take authorizations in the National Defense Authorization Act, coupled with the proposed virtually unfettered exemption for national defense, would not only be disastrous for marine mammals, but would set a double standard by significantly limiting, or exempting altogether, the military from MMPA requirements that all other federal, state, and private actors must follow. We strongly recommend that Congress refrain from amending some of the most important provisions of the MMPA through this bill. We believe that the issues raised by the Department of Defense should be considered by the House and Senate committees of jurisdiction, after significant discussions with other federal agencies, scientists, and conservation groups, in the context of an overall MMPA reauthorization package.

Our more detailed comments are organized as follows. First, we provide background on the MMPA and its incidental take provisions. Second, we address the problems with the Defense Department’s proposed changes to the definition of “harassment.” Third, we address the proposed amendments to create an incidental take authorization process specific to military readiness activities. Fourth, we explain why the proposed statutory changes to the incidental take authorization process are not necessary. Finally, our testimony will address the proposed MMPA broad categorical exemption for purposes of national defense.

II. BACKGROUND ON THE MARINE MAMMAL PROTECTION ACT

A. Moratorium on Taking

The MMPA is the most comprehensive marine mammal conservation and management legislation in the world. Passed to rectify the consequences of "man's impact upon marine mammals, which has ranged from what might be termed malign neglect to virtual genocide," H.R. REP. NO. 707, 92d Cong., 1st Sess. 11 (1971) the MMPA, enforced by the U.S. Departments of Commerce and the Interior, governs every interaction within U.S. jurisdiction between an individual and a marine mammal. Its purpose is to protect marine mammal species of "great international significance, aesthetic and recreational as well as economic." Among the species protected under the Act are whales, dolphins, porpoises, seals, walruses, sea otters, manatees, and polar bears.

It is the goal of the MMPA that these species be "protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management... [in order to] maintain the health and stability of the marine ecosystem." 16 U.S.C. §1361 (6). Congress also mandated marine mammals are to be protected and managed so that they do not "cease to be a significant functioning element in the ecosystem of which they are a part" or be allowed to "diminish below their optimum sustainable population" (OSP). 16 U.S.C. 1361(2) (1994). A species or population stock that is determined to be below its OSP level, or is listed as endangered or threatened under the ESA, is designated as "depleted" under the MMPA.

Congress sought to achieve broad protection for marine mammals by establishing a moratorium on their importation and "take." The term "take" means "to harass, hunt, capture, or kill or attempt to harass, hunt, capture or kill any marine mammal." 16 U.S.C. 1362(13). However, certain activities may be exempted from this moratorium, such as: scientific research; activities designed to enhance the survival or recovery of a marine mammal species or stock; commercial and educational photography; first-time import for public display; capture of wild marine mammals for public display; incidental take during commercial fisheries; and incidental take during non-fishery activities.

B. Exemptions for Incidental Take

Under sections 101 (a)(5)(A) and 101 (a)(5) (D) of the MMPA, the Secretary of Commerce or Interior may waive the moratorium and issue a permit or letter of authorization for taking small numbers of marine mammals, provided he or she determines, using the best available scientific evidence, that such take would have only a negligible impact on the marine mammal species or stocks.

Under section 101(a)(5)(A) of the MMPA, the Secretaries of Commerce or Interior may authorize the taking of small numbers of marine mammals incidental to activities other than commercial fishing (covered by other provisions of the Act) within a specified geographical region when, after notice and opportunity for public comment, the responsible regulatory agency (either the National Marine Fisheries Service (NMFS) or the Fish and Wildlife Service (FWS))

determines that the taking would have negligible effects on the affected marine mammal species or stock, and that the take will not have an unmitigable adverse impact on subsistence harvests of these species. The Act also requires the Secretary to set forth permissible methods and levels of “take” within a specified geographic region as well as requirements for monitoring and reporting. Issuance of a “small take” authorization, also known as a Letter of Authorization (LOA), includes two comment periods, possible public hearings, and consultations prior to the promulgation and publication of regulations in the Federal Register. It can take from 6 to 12 months for the agencies to complete this process.

Section 101(a)(5)(D), added to the MMPA in 1994, provides a more streamlined mechanism for obtaining authorizations when the taking will be of small numbers of marine mammals by incidental harassment only. Under this provision, referred to as an Incidental Harassment Authorization (IHA), the Secretary is required to publish in the Federal Register a proposed authorization within 45 days after receiving an application. Following a 30-day public comment period, the Secretary then has 45 days to either issue or deny the requested authorization. Because the incidental harassment authorization process has eliminated the need for promulgating specific regulations on the incidental taking, IHAs provide individuals who wish to carry out or undertake relatively short-term activities that might inadvertently harass marine mammals an expedited means to acquire an incidental take authorization. By law, the entire process can run no longer than 120 days.

C. Definition of Harassment—The 1994 Amendment

The exemptions for incidental take are wedded to the definition of “harassment” since the definition establishes the regulatory threshold to allow the applicant to make an initial assessment whether a small take or an incidental harassment authorization is needed. The definition describes a range of impacts that the regulatory agencies must assess during the authorization process to determine whether to authorize the activity. In 1994, Congress amended the MMPA to differentiate between two general types of harassment: Level A, having the potential to cause physical injury and Level B, having the potential to impact behavior of marine mammals in the wild. The definition is as follows:

- (18)(A) The term "harassment" means any act of pursuit, torment, or annoyance which -
 - (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or
 - (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.
- (B) The term "Level A harassment" means harassment described in subparagraph (A)(i).
- (C) The term "Level B harassment" means harassment described in subparagraph (A)(ii).

III. PROPOSED CHANGES TO THE DEFINITION OF HARASSMENT

A. Proposed New Definition

The Department of Defense claims that the definitions of Level A and Level B harassment added to the MMPA in 1994 are overly broad and somewhat ambiguous. In an attempt to resolve this perceived problem, the Department of Defense has proposed the following definition:

For purposes of military readiness activities, the term ‘harassment’ means any act which--

- (i) injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or
- (ii)(I) disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavior patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behavioral patterns are abandoned or significantly altered; or
- (II) is directed toward a specific individual, group, or stock of marine mammals in the wild that is likely to disturb the individual, group, or stock of marine mammals by disrupting behavior, including, but not limited to migration, surfacing, nursing, breeding, feeding or sheltering.

B. Problems with the Proposed Definition

The most salient effect of this language is to raise the threshold of regulatory action. For Level A harassment, the proposed definition would shift from “has the potential to injure” to “injures or has the *significant* potential to injure.” For Level B harassment, “potential to disturb” would become “disturbs or *is likely* to disturb;” and an addition would be made to the language governing behavioral disruptions, requiring that “natural” behaviors be “*abandoned or significantly altered.*” (emphasis added).¹

This new language would also introduce new uncertainty into the Act. Adding the term “significant” to the definition would take the Act into a scientific and policy arena that is beset by ambiguity. NMFS has struggled with this term and has yet to define it with regard to the “significant adverse impact” clause in the Act’s “incidental take” provisions for commercial fishing (16 U.S.C. §§ 1383(g)(2), 1387(g)(4)). Currently, the state of marine mammal science will not yield a clear, practical definition of “significant potential” or of “significantly altered”; indeed, these terms are likely to generate more scientific questions than answers.

¹ The third subparagraph, which establishes a somewhat more conservative standard for behavioral impacts, would apply only to activities that are directed toward a specific individual, group, or stock of marine mammals, not to activities that take marine mammals incidental to their operation. This provision would not cover any of the activities for which the DoD has sought small take permits or incidental harassment authorizations under the MMPA.

The term “potential” is clear and requires no further evaluation of the significance of an activity’s likelihood to injure or disturb. It is protective of the species, requiring only the disruption of basic biological functions or behavioral patterns such as migration, breathing, nursing, breeding, feeding, or sheltering—impacts that are reasonably verifiable—rather than significant alteration of these biologically important behaviors, to trigger the Act’s prohibitions. Moreover, because the definition references “disruptions in behavioral patterns,” it is clear that it does not encompass any and all behavioral modifications.

The bill also adds a new requirement to Level B harassment that natural behavioral patterns be disrupted to the point where such behavioral patterns are abandoned. Requiring the abandonment of critical biological behaviors for an action to constitute harassment violates the precautionary goals of the Act and sound scientific conservation principles. In addition, what constitutes “abandonment” of behavioral patterns under the proposed new definition of Level B harassment will vary according to species, gender, time scale, and the nature of the behavior itself. The proposed amendment offers no basis to determine what constitutes abandonment of behavioral patterns. For example, would abandonment of a nursing bout between an endangered right whale mother and calf be treated the same as temporary abandonment of the migratory path of a gray whale? In fact, it is unclear whether either event would count as “abandonment” under the revised definition.

Taken together, these changes would have a debilitating effect on enforcement. Under the terms of the Act, the Defense Department itself would have initial authority to decide whether its activities have the “significant potential to injure” marine mammals or are likely to “significantly alter” marine mammal behavior. A great many activities could simply evade the Act’s requirements by the Defense Department’s relying upon the uncertainty and ambiguity in this new language and not seeking authorization in the first place. For the public or NMFS to enforce the Act in these circumstances would be difficult.

The practical outcome is that many more marine mammals would be harmed by military activities. Potentially injurious activities that were once assessed, monitored, and mitigated under the Act would no longer enter the permit process. NMFS could not ensure that the impacts of such activities on populations or stocks would be negligible. In addition, small take permit and incidental harassment authorization mitigation measures and monitoring requirements that have been effective in protecting marine mammal populations and resulted in critical information on the impacts of a particular activity would be lost. Overall, the result of these changes is likely to be more injury and death of marine mammals, less mitigation and monitoring of impacts, less transparency for the public and the regulatory agencies, and even more controversy and debate.

C. Mischaracterizations of Issues Related to the Definition of Harassment.

In his written testimony before the Subcommittee on Readiness of the House Armed Services Committee, Deputy Under Secretary of Defense, Raymond F. Dubois, Jr. stated that: “The new definition, as we requested last year, reflects the position of the National Research Council (NRC) and focuses on minimizing injury and biologically significant disruptions to behavior critical to survival and reproduction.”

The NRC convened a panel on marine mammals and low frequency sound that, among other things, looked at the MMPA's definition of harassment (National Research Council 2000). However, the NRC recommendations differ substantially from the Defense Department's proposed amendment. First, the NRC panel proposed no modifications to the definition of "Level A" or injurious harassment. Second, the NRC retained the current standard of probability in the definition for "Level B" harassment, by including the phrase "has the potential to disturb a marine mammal..." Third, the NRC did not raise the threshold for the disruption of natural behaviors in Level B harassment to the Department of Defense's level of "abandonment or significantly altered."²

In its testimony, the Defense Department, to bolster its assertion that the definition of harassment is flawed and must be changed, cites two examples of recent federal district court cases where scientific research was stopped due to concerns about acoustic impacts to marine mammals. Deputy Assistant Secretary of the Navy, Wayne Army, before the Subcommittee on Readiness of the House Armed Services Committee, stated:

"In one case, the court enjoined seismic air gun research on geological fault lines conducted by the National Science Foundation off the coast of Mexico based on the court's concern that the research may be harming marine mammals in violation of the ESA and NEPA. In another case a court enjoined a Navy funded research project by the Woods Hole Oceanographic Institute designed to study the effectiveness of a high frequency detection sonar (similar to a commercial fish finder) in detecting migrating Grey Whales off the coast of California. The court's order stopped research on the development of a promising mitigation measure to avoid harming marine mammals from acoustic sources."

In the case of the National Science Foundation's (NSF) use of seismic airguns to undertake geological research, NSF never even applied for an incidental take authorization under the MMPA. In addition, the project was funded and implemented without completing an Environmental Assessment or Environmental Impact Statement under the National Environmental Policy Act (NEPA). The Woods Hole case involved a series of permits issued by NMFS for scientific research pursuant to section 104 of the MMPA. Moreover, the challenge to these permits was brought under NEPA for failure to perform the required analysis of environmental impacts, not the MMPA. Although we understand the adverse reactions that these

² The definition proposed by the NRC, while more conservative than that proposed by the Department of Defense, introduces two new subjective and ambiguous terms - "meaningful" and "biologically significant." The Marine Mammal Commission (MMC) noted in its testimony before the House Resources Committee in 2001 that:

"Even were there a common understanding of these terms, their inclusion appears to be premised on an unrealistically high assessment of our ability to differentiate between biologically significant and insignificant responses... However, when assessing activities that cause behavioral modification, we often cannot distinguish between those activities that will have significant, long-term effects and those that will not... Until we have the capability to distinguish reliably between what is and is not significant, or what will or will not have long-term consequences, the Commission believes that it would be ill-advised to adopt a definition that excludes consideration of short-term impacts entirely."

decisions have engendered within the scientific community, these cases have little or no bearing on the sweeping statutory changes to the MMPA sought by the Department of Defense.

IV. PROPOSED CHANGES TO THE MMPA'S SMALL TAKE AND THE INCIDENTAL HARASSMENT PROVISIONS

The Department of Defense proposes to create a separate incidental take authorization process for military readiness activities. While similar to the existing small take and incidental harassment authorizations in Sections 101 (a)(5)(A) and 101 (a)(5)(D) of the MMPA respectively, the proposed process eliminates key conservation elements that restrict the scope of the incidental take to small numbers of marine mammals while engaging in a specified activity within a specified geographic region.

A. Deletion of Requirement That Incidental Take Authorization Be Limited to Small Numbers of Marine Mammals of a Species or Population Stock

Sections 101(a)(5)(A) and 101(a)(5)(D) of the MMPA allow the Secretary to authorize the incidental take of only “small numbers of marine mammals of a species or population.” Although in restricting the take to “small numbers” of marine mammals the Committee acknowledged that it was unable to offer a more precise formulation because the concept was not capable of being expressed in absolute numerical limits; it made clear its intent that the taking should be infrequent, unavoidable, or accidental. H.R. REP. NO. 228, 97th Cong., 1st Sess. 19 (1981). Therefore, it is obvious that the incidental take authorization is not intended to provide the Department of Defense with the ability to take unlimited numbers of marine mammals. In addition, the Committee noted that this requirement is separate and distinct from the required finding that the taking of small numbers of marine mammals will have a negligible impact on such species or stock. Id.

The requirement that incidental take under these provisions be limited to “small numbers of marine mammals of a species or population stock” is an important and independent requirement that should continue to apply to all persons, including the Department of Defense. Deleting this requirement would allow increased and potentially unsustainable levels of injury or harassment. Although it is true that the bill retains the requirement that the Secretary find that the incidental taking have a negligible impact on the species or stock, these impacts are difficult to analyze, especially for marine mammal stocks for which little is known about their abundance or biology. Without the “small number” limitation, it may be difficult to evaluate the effects of injury or harassment on annual rates of recruitment and thereby establish sufficiently stringent quantitative standards for negligible impact, this creates the risk that adverse, possibly irreversible impacts will occur before they can be assessed. The additional requirement in the existing law, that the take be restricted to small numbers of marine mammals, ensures that that the biological consequence of that take will not hinder a marine mammal population’s ability to grow or recover.

B. Deletion of Requirement That Activities Take Place Within a Specified Geographical Region

Congress amended the MMPA in order to ensure that the specified activity and the specified region are narrowly identified so that the anticipated effect would be substantially similar. H.R. REP. NO. 228, 97th Cong., 1st Sess. 19 (1981). NMFS defines specified geographical region as “an area within which a specified activity is conducted and that has certain bio-geographic characteristics.” C.F.R. § 216.103. The Defense Department’s proposal would strike this requirement – despite its importance to environmental assessment under the Act, and its consonance with sound management of marine mammals.

Restricting the activities to a specified region is in keeping with the requirements that the incidental taking must have a negligible impact on a stock of marine mammals and ensure that the taking has the least practicable adverse impact on its habitat. NMFS criteria for stocks states that stocks should be defined on the smallest divisible unit approaching that of the area of take unless there exists evidence of smaller subdivisions provided by ecology, life-history, morphology, and genetics data. (NMFS 1995 and 1997). In combination with the “small numbers” limitation discussed previously, this fine-scale approach to defining stocks provides an effective conservation and management strategy for restricting take geographically and numerically to prevent depletion of marine mammal populations and for prescribing mitigation that is appropriately tailored and scaled.

In addition, geographic regions themselves serve different biological purposes for marine mammal stocks. Some areas are vital to foraging, others are migratory corridors, and still others are vital to breeding, calving, and reproduction. The biological significance of a particular habitat or region is critical for determining whether the taking will have a negligible impact on the population of marine mammals and result in the least practicable adverse impact on its habitat.

Removing the requirement that the incidental take be restricted to a specified geographic region is contrary to effective conservation and management practices that limit take to narrowly defined marine mammal stocks on a restricted geographic basis to avoid depletion. It also jeopardizes the MMPA’s goals of habitat conservation as it undermines effective consideration of the biological role or significance of the habitat to that marine mammal stock.

C. Other Proposed Changes to the Incidental Take Provisions

The Defense Department has proposed a number of additional changes to the incidental take authorization that could impair the process of environmental review.

First, under current law, both the incidental take and incidental harassment authorizations must prescribe “permissible methods of taking by harassment pursuant to such military readiness activity, and other means of affecting the least practicable impact upon such species or stock and its habitat, paying particular attention to rookeries and mating grounds and areas of similar significance...” The Department of Defense proposes to remove the phrase “and areas of similar

significance.” This amendment is scientifically indefensible and could significantly limit the types of habitats to be considered, further eroding the conservation goals of this provision.

Second, the law currently provides for public notice and comment on small take authorizations. The bill, however, would limit that requirement to decisions to withdraw or suspend an already existing authorization (except, as under current law, when the Secretary determines that an emergency exists and therefore the notice and comment provisions do not apply). Perhaps this is an oversight, but there is no logical reason to provide notice and comment only on decisions to withdraw or suspend an existing small take authorization and not on the decision whether to issue such an authorization in the first instance.

Third, the incidental harassment authorization currently requires the applicant to apply and for NMFS to solicit public comments on that application through a notice in the Federal Register, “newspapers of general circulation, and appropriate electronic media and to all locally affected communities.” In comparison, the bill requires only that the Secretary receive a “request” to trigger the public notice and comment requirement and limits notification to the Federal Register. This change could be interpreted to eliminate the application requirement thus reducing the ability for the public to effectively evaluate the proposed incidental harassment. By restricting notification to the Federal Register, this provision of the bill would also significantly curtail public notice, thereby limiting meaningful public participation on proposals that could have serious implications for private citizens.

Finally, the bill would add a provision stating, “Nothing in this chapter shall require disclosure of information classified in the interest of national defense.” We are concerned that specifically protecting classified documents from disclosure for purposes of environmental review will further undermine NMFS’s ability to do an effective environmental analysis and prescribe mitigation measures.

V. The Department of Defense Has Not Made a Compelling Case That These Statutory Changes Are Needed

A. Incidental Take Permits Are Routinely Granted on a Timely Basis

Since 1994, when the current definition of “harassment” was adopted, the Department of Defense has submitted six applications for small take authorizations and sixteen under its “incidental harassment authorizations,” one of which was subsequently withdrawn. As Assistant Administrator William Hogarth noted in his testimony before the Committee on Armed Services in March, 2002, no application for either a small take or incidental harassment authorization submitted by the Defense Department has ever been denied.

From the period 1994 to present, the Defense Department sought six small take authorizations. For four of these applications, it took an average of just over fifteen months from application date to the effective date of authorization. As noted above, decisions on small take applications can take from 6-12 months to promulgate regulations and issue the LOA. Fifteen months barely falls outside of that range.

In only two cases, applications to take marine mammals incidental to shock testing of the USS Seawolf and the deployment of the SURTASS LFA, the decision process took approximately three years. This was due to a myriad of factors, unique to these applications, including their scope, complexity, number of public comments received, and time required to comply with the National Environmental Policy Act.

Similarly, the incidental harassment authorizations averaged just over four months from application to effective date of authorization. Most of these fell within the statutory mandate of 120 days. In light of this information, the Department of Defense has not shown either that it is unable to comply with the existing permitting requirements or that the length of the existing incidental take process is burdensome. To the contrary, it appears that the program is functioning much as Congress intended.

B. Results of a GAO Study Support This Conclusion

The conclusion that the Defense Department has not demonstrated the need for major changes in the MMPA is consistent with a recent study, released last June, by the General Accounting Office (GAO). The GAO concluded that commanders throughout the Armed Forces continue to report a high level of combat readiness, and that the Defense Department has failed to document either the adverse impacts on training or the increased costs associated with meeting its stewardship responsibilities.³

C. Opportunities Exist to Improve Implementation of the Act Administratively

The Defense Department's proposal to create a separate incidental take exemption process for military readiness activities would introduce substantial ambiguity and would eliminate critical elements from the authorization process. Rather than pursue dramatic legislative change, the need for which has not been demonstrated, we believe that the Department should look to non-legislative alternatives to further streamline the administrative process. In this context, Assistant Administrator Hogarth, in his March 2002 testimony, stated:

Our ability to be efficient stems in large part from our ability to discuss activities with our Navy counterparts in advance, and with an understanding of the overall activities and needs of the program. With respect to our regulatory program, our limited staff is directly related to our ability to meet the increasing demands by Navy and other agencies. However, to the extent the Navy and other action agencies can plan sufficiently far in advance of activities and provide us with adequate time to work with them at the earliest possible stages, the implications of the permit process should be minor.⁴

The Department of Defense and NMFS are about to sign a Memorandum of Understanding that would further improve the authorization process. Based on these statements, and our own

³ General Accounting Office, Military Training: DoD Lacks a Comprehensive Plan to Manage Encroachment on Training Ranges (June 2000) (GAO-02-614).

⁴ Available at this time in transcript form from www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/02-03-14hogarth.html.

knowledge of how the current program functions, we believe there are a number of ways to administratively improve its implementation to address the concerns of the Department of Defense, without amending the statute or undermining its conservation objectives. We believe that this approach is the most expedient way to achieve both marine mammal conservation and to improve efficiency in the issuance of permits for military readiness activities. As a first step, we urge NMFS to undertake a programmatic review of the incidental take authorization program as a means to improve efficiency and meet the goals and mandates of the MMPA.

VI. PROPOSED EXEMPTIONS OF ACTIONS NECESSARY FOR NATIONAL DEFENSE.

Under subsection (e), Exemptions Of Action Necessary For National Defense, the Secretary of Defense may exempt any action or category of actions undertaken by the Department of Defense from compliance with any requirement of the MMPA if the Secretary determines it is necessary for national defense. The exemption is for a period of two years with the possibility of unlimited additional exemptions, each two years in duration. The effect of this provision is to create an escape clause that allows the Defense Department to bypass the incidental take permitting process entirely. Moreover, this exemption would apply broadly to any requirement of the MMPA for any action or category of actions undertaken by the Defense Department which the Secretary determines are necessary for national defense.

We believe this exemption is excessively broad for four reasons. First, it would vest authority to grant an exemption entirely in the Secretary of Defense. Second, the exemption applies to “any action or category of actions undertaken by the Department of Defense or its components” – and so is not limited to individual activities, technologies, or exercises, allowing in theory for a sweeping application of this provision. Third, the exemption confers immunity from “compliance with any requirement” of the MMPA. Fourth, the Secretary of Defense can avail himself/herself of endless renewals of the exemption. Even more fundamentally, we believe the Department of Defense has failed to demonstrate an irreconcilable conflict exists within the incidental take authorization or any other provision of the MMPA that would merit such an exemption—one that would render the MMPA’s conservation goals and mandates virtually meaningless.

The Department of Defense has flexibility under the Armed Forces Code, 10 U.S.C. § 2014, to seek special accommodation and relief from any agency action that, in its determination, would have a “significant adverse effect on the military readiness of any of the armed forces or a critical component thereof.” If the accommodations it seeks are not forthcoming and an agreement is not reached directly with the head of the Executive agency concerned, it may take its case directly to the President. These provisions have never been invoked with regard to the MMPA, presumably because the Department’s requests for authorization under the Act have never been denied and because any mitigation required by the agency was judged not to have a significant adverse effect on readiness. The Department of Defense has not demonstrated that either the flexibility to seek special accommodation and relief under the Armed Forces Code is insufficient or that the broad exemptions it now seeks are warranted.

VII. CONCLUSION

Our groups support the military's efforts to protect national security and are sensitive to the issue of military readiness. We do not believe, however, that the Defense Department has demonstrated that the dramatic changes proposed are necessary or that it has utilized the administrative remedies available to it under existing law. The Department of Defense's proposals to modify the MMPA's definition of harassment, create a separate incidental take authorization process for military readiness activities, and create a broad exemption to the MMPA, threaten to severely undermine the precautionary nature of the Act and lead to significantly increased harm to marine mammal populations.

We support a process, in the context of MMPA reauthorization, in which all stakeholders can work together to develop creative and collaborative approaches to demonstrated problems. We hope this Committee will allow us the opportunity to work constructively on alternative approaches with all of the affected agencies and organizations to try and address the Department's concerns before any fundamental changes are made to this keystone conservation law.