

Ryan P. Steen
On Behalf of the International Association of Geophysical Contractors
Written Testimony on
The Marine Mammal Protection Act
Before the
U.S. House of Representatives Natural Resources Committee
Subcommittee on Energy and Mineral Resources
“Deficiencies in the Permitting Process for Offshore Seismic Research”
January 19, 2018

Chairman Bishop, Ranking Member Grijalva, and Members of the Subcommittee:

For the record, my name is Ryan Steen and I am a Partner in the law firm of Stoel Rives, LLP. I have extensive experience in environmental regulation and litigation, particularly in matters involving the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA). Over the past decade, I have assisted clients with obtaining regulatory authorizations for offshore activities in the Beaufort Sea, the Chukchi Sea, the Cook Inlet, the Gulf of Mexico, and the Atlantic Ocean. I have also represented clients in litigation involving challenges to some of those authorizations, including in multiple proceedings before the Alaska federal district court and the Ninth Circuit Court of Appeals. In addition to my law degree, I have a Bachelor of Science degree in fisheries. Prior to beginning my law career, I worked as a fisheries biologist for the University of Washington. My professional career has therefore had a strong focus on the management of ocean resources, both from the perspective of a scientist and from the perspective of a lawyer.

I present this testimony on behalf of my client, the International Association of Geophysical Contractors (IAGC). The IAGC is the international trade association representing all segments of the geophysical industry, essential to discovering and delivering the world’s energy resources. The IAGC member companies play an integral role in the successful exploration and development of hydrocarbon resources, onshore and offshore, through the acquisition and processing of geophysical data. For more than 45 years, IAGC has been the global voice of the geophysical industry and is the only trade organization solely dedicated to the industry. The IAGC represents more than 110-member companies from all segments of the geophysical industry. These members help to shape industry priorities and positions through IAGC chapters, committees, and workgroups.

I appreciate the opportunity to testify before the Subcommittee on Energy and Mineral Resources regarding the significant need and support for modernizing the MMPA. This need was recently accentuated by the December 2017 Report to the Chairman, Committee on Natural Resources, House of Representatives from the U.S. Government Accountability Office entitled “Offshore Seismic Surveys—Additional Guidance Needed to Help Ensure Timely Reviews,” GAO-18-60 (GAO Report). Below, I first provide important background information regarding

the key MMPA provisions, and related legal processes, at issue here. I then discuss the application of those provisions and processes in the context of two case studies. Following that discussion, I address the negligible impact of seismic survey activities, recommendations for improvements to the MMPA, and the related positive aspects of the *Strengthening the Economy with Critical Untapped Resources to Expand American Energy Act* (the “SECURE American Energy Act”).

A. Legal Framework

In the Outer Continental Shelf Lands Act (OCSLA), Congress expressly mandated the “expeditious and orderly development” of the Outer Continental Shelf (OCS) “subject to environmental safeguards.” 43 U.S.C. § 1332(3). Courts have since confirmed that “the expeditious development of OCS resources” is OCSLA’s primary purpose. *California v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981). Congress enacted OCSLA to “achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.” 43 U.S.C. § 1802(1). Congress expressly intended to “make [OCS] resources available to meet the Nation’s energy needs as rapidly as possible.” *Id.* § 1802(2)(A). Seismic surveying has been and continues to be essential to achieving OCSLA’s requirements because it is the only feasible technology available to accurately image the subsurface of the OCS before a single well is drilled.

Offshore seismic surveys require authorizations from the Bureau of Ocean Energy Management (BOEM), pursuant to OCSLA. *See id.* § 1340. There is no requirement for an applicant for an offshore survey permit under OCSLA to obtain an incidental take authorization under the MMPA. However, unlawful “takes” of marine mammals incidental to lawful activities (such as a permitted offshore seismic survey) may nevertheless be subject to MMPA-based penalties. *See* 16 U.S.C. § 1375. Accordingly, many applicants for offshore survey permits from BOEM also request incidental (*i.e.*, unintentional) take authorization under the MMPA from the National Marine Fisheries Service (NMFS) and/or the U.S. Fish and Wildlife Service (FWS).¹

In this context, it is important to recognize that the permit issued by BOEM authorizes the *seismic survey* and the MMPA authorization narrowly addresses the *incidental take* associated with the seismic survey. NMFS and FWS do not have jurisdiction over the survey; their authority under the MMPA extends only to the authorization of incidental take. Notwithstanding the limited role of FWS and NMFS, MMPA authorizations are often the primary cause of administrative delay in the offshore seismic survey permitting process.

The MMPA establishes a prohibition on the “taking” of marine mammals in U.S. waters, unless the taking is authorized by NMFS or FWS. The MMPA provides mechanisms for authorizing the taking of marine mammals, including the taking of marine mammals incidental to lawful activities under Section 101(a)(5). *See id.* § 1371(a)(5). “Take” means “to harass, hunt, capture or kill” a marine mammal, or attempt to do so. *Id.* § 1362(13). “Harassment” is, in turn,

¹ FWS has jurisdiction over polar bears, walrus, sea otters, dugongs, and manatees. NMFS has jurisdiction over all other marine mammals.

defined as “any act of pursuit, torment, or annoyance” that either:

- (i) “has the potential to injure a marine mammal or marine mammal stock in the wild” (referred to as *Level A* harassment) (*id.* § 1362(18)(A)(i)); 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” (referred to as *Level B* harassment) (*id.* § 1362(18)(A)(ii)).

NMFS has established acoustic guidelines that it applies to determine whether sound at certain decibel levels may cause Level A or Level B harassment.

For many years, NMFS and FWS have authorized the incidental taking of marine mammals for activities related to offshore oil and gas exploration, including seismic surveys. The vast majority of MMPA incidental take authorizations associated with offshore oil and gas activities has involved short-term, temporary behavioral harassment (Level B). These authorizations have been made through either (i) the issuance of “incidental take regulations” (ITRs) under Section 101(a)(5)(A), which are effective for a period of up to five years, or (ii) the issuance of “incidental harassment authorizations” (IHAs) under Section 101(a)(5)(D), which are effective for a period of no more than one year.

Because the issuance of an incidental take authorization under the MMPA is a “federal action,” it triggers an informal or formal consultation under Section 7 of the ESA and review under the NEPA. Although current law requires ESA compliance for MMPA authorizations, that compliance provides no additional substantive protection to marine mammals because, as courts have confirmed, the “negligible impact” standard for issuing an incidental take authorization under the MMPA is more stringent than the standard applicable to a finding of “no jeopardy” under Section 7 of the ESA. *See In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 233 n.18 (D.D.C. 2011).

The MMPA establishes deadlines for the processing of IHA applications. Specifically, Section 101(a)(5)(D) states that the “Secretary shall publish a proposed authorization not later than 45 days after receiving an [IHA] application” and request public comment. 16 U.S.C. § 1371(a)(5)(D)(iii). After holding a 30-day comment period, the Secretary “shall issue” the IHA within 45 days of the close of the comment period, so long as the required MMPA findings are made. *Id.* These deadlines are particularly important because IHAs are issued for a period of only one year and planning for offshore surveys is complicated and very time-sensitive. Indeed, Congress specifically intended the issuance of IHAs to be an “expedited process” that was “needed to address the procedural problems that have arisen in seeking authorizations for harassment takes under existing section 101(a)(5) of the MMPA.” H.R. Rep. No. 103-439, at 29 (1994). The MMPA does not contain timing requirements applicable to the issuance of ITRs under Section 101(a)(5)(A).

Some observations regarding the regulatory processes described above warrant particular emphasis here:

- IHAs involving offshore oil and gas-related activities are rarely, if ever, issued within the timing requirements of the MMPA. NMFS even states on its website that the IHA permitting process takes at least six to nine months to complete. The process often takes much longer. The MMPA provides no consequences for such delay, nor does it provide any incentives to NMFS and FWS to avoid delay.
- Because the MMPA contains no timing requirements applicable to ITRs, the regulatory process for the issuance of ITRs often takes years and, in my view, is de-prioritized by the agencies because other agency obligations are subject to timing requirements and consequences.
- The ESA Section 7 consultation process is cumbersome and time-consuming. The Section 7 process is also subject to statutorily mandated deadlines, but those deadlines are routinely ignored by NMFS and FWS without consequence. The Section 7 consultation process is often a significant cause of the delay in the issuance of an authorization under Section 101(a)(5) of the MMPA, even though the substantive standard governing the Section 7 process is *less stringent* than the MMPA’s “negligible impact” standard.
- Another significant source of delay in the issuance of MMPA incidental take authorizations involves the estimation of the number of “takes” that are expected to occur. Because the MMPA’s definition of “take” is extraordinarily broad and ambiguous (more so than the ESA’s definition of “take”), FWS and NMFS struggle to determine what activities actually cause take and, as a result, they apply extremely conservative assumptions to ensure that their take estimation modeling encapsulates all conceivable take (and more). This process results in take estimates that are inaccurate and vastly exaggerate the number of takes that will actually occur.
- The take estimation modeling exercises are considerably more complicated and play an unduly important role in the permitting process because the agencies are required to demonstrate that the incidental take authorization will not only have a “negligible impact” on the potentially affected marine mammal stocks but also affect “small numbers” of marine mammals. The term “small numbers” has no biological significance whatsoever to the marine mammal population and is a legal term of art that has notoriously confused courts and regulators alike.
- All of these regulatory problems and inefficiencies create fertile ground for legal challenges by advocacy groups that will readily file any and all available lawsuits for the sole purpose of impeding and preventing the development of the OCS.

B. Regulation of Offshore Activities—Two Case Studies

1. Atlantic

Approximately 30 years have passed since the potential hydrocarbon resource base of the U.S. Atlantic OCS has been assessed with seismic surveys. In the meantime, seismic surveys for “scientific research” have been conducted fairly regularly in the Atlantic OCS, in addition to

other geophysical surveys used to characterize the seabed and subsurface for suitability of offshore wind energy facilities. Six IAGC member companies have applied to BOEM for permits to conduct seismic surveying in the Atlantic OCS—a process that started seven years ago when the first permit application was filed. These proposed surveys are essential to the “expeditious and orderly development” of the OCS, as mandated by Congress.

After extensive environmental review at the programmatic level, BOEM published a Record of Decision in July 2014, authorizing the consideration of permits for seismic surveys in the Atlantic OCS. Since then, the pending permit applications have been subjected to a regulatory process plagued with delays and uncertainty. This inexplicable process was capped by the Obama Administration’s abrupt political decision, on the eve of a new Presidency, to summarily deny all permit applications. BOEM has since correctly reinstated the permit applications, which remain under agency review.

Needless to say, obtaining a permit to conduct a seismic survey in the Atlantic OCS has been a seemingly unending process that has included many environmental impact analyses, multiple opportunities for public comment and review, including additional and unprecedented public comment periods that are not required by statute or regulation, and reviews by bordering states. *See* Attachment A. However, the most concerning and problematic delays primarily relate to the difficulties faced by the applicants in acquiring IHAs from NMFS for the incidental take of marine mammals pursuant to the MMPA. BOEM has indicated that it will not issue decisions on the pending seismic survey permits until NMFS has also authorized IHAs for the proposed activities.

As part of the permitting process to move forward with data acquisition on the Atlantic OCS, IAGC members have applied to NMFS for the issuance of IHAs. The IHA applications were submitted in 2014 (with some of them updated in the summer of 2015). The *proposed* IHAs were not issued until *June 6, 2017*. Again, under the MMPA, the proposed IHAs were required to have been issued within *45 days* of NMFS’s receipt of the applications. This substantial delay was exacerbated by NMFS’s decision to issue the IHA *applications* for public comment—an unprecedented procedure that is not required or contemplated by the MMPA. Under the MMPA, the final IHAs were required to have been issued within 45 days of the close of the 30-day comment period for the proposed IHAs. However, as of the date of this testimony, the final IHAs have still not been issued by NMFS. In sum, NMFS has exceeded the MMPA’s timing mandates for the processing of the Atlantic IHAs by *more than two years* (and the applicants still await their authorizations). This has not been the “expedited process” Congress envisioned when it enacted the MMPA’s IHA provisions. Unfortunately, the MMPA provides no remedy or consequence for this delay. This delay is specifically documented with detail in the GAO Report. *See* GAO Report at 31-36.

Many reasons have been speculated for the delays in NMFS’s issuance of decisions on the pending IHA applications. According to NMFS, some delay resulted from its receipt of an unpublished study from Duke University that, at that time, was unavailable to the public. At the request of environmental advocacy organizations, NMFS apparently stalled its processing of the pending applications to consider the unpublished study. Delay has also been attributed to uncertainty over the application of a series of drafts and final guidance addressing acoustic

threshold levels for permanent and temporary auditory threshold shifts in marine mammals. In other words, NMFS has attributed significant portions of its delay to the agency's receipt and processing of "new" information. However, the MMPA contains no provisions allowing NMFS or FWS to toll the statutory timing requirements based upon the receipt of new information. To the contrary, NMFS is required to make its decisions within the statutorily mandated timeframes based on the best information *available during those timeframes*. Moreover, as the courts have held, "an agency need not revise its action every time new data or a new model is announced because doing so would lead to significant costs and potentially endless delays in the approval processes." *Dow AgroSciences LLC v. NMFS*, 707 F.3d 462, 473 (4th Cir. 2013) (internal quotation marks omitted).

In addition, much has been made by advocacy groups and the media of the estimate for as many as 138,000 Level A (potentially injurious) "takes" in the BOEM's programmatic environmental impact statement (PEIS) addressing the potential effects of seismic activities in the Atlantic Ocean. However, this estimate—like the other estimates in the PEIS—is, as BOEM has acknowledged, a *substantial overestimate* because it is based on an unrealistic scenario in which seismic survey activities are projected to result in thousands of incidental takes of marine mammals. The modeling exercise relied upon by BOEM and NMFS uses a multiplicative series of conservatively biased assumptions for all uncertain parameter inputs. These assumptions lead to accumulating bias as the cumulative conservative assumptions add up to increasingly unlikely statistical probabilities that are not representative of real-world conditions. Consequently, the results are improbable worst case scenarios, *not* accurate representations of likely effects.² Using more realistic risk criteria and modeling assumptions, and taking into account standard monitoring and mitigation practices employed by the seismic industry, the more likely estimate of potential Level A takes is zero or a comparably small number. *See* Attachment B. This more likely estimate is corroborated by the best available information, which includes no observations of any harm to marine mammal populations (in any region) as a result of seismic exploration activities.

The IHA provisions of the MMPA were added by Congress to create an "expedited process." H.R. Rep. No. 103-439, at 29. With over two years of delay, and a continuing lack of any final decisions by NMFS, the Atlantic IHAs have been anything but expeditious. This excessive delay undermines Congress's clear mandate in OCSLA to carry out the "expeditious and orderly" development of the OCS "subject to environmental safeguards." As environmental advocacy groups increasingly view offshore issues—specifically opposition to seismic surveys—as a lucrative source of fundraising, MMPA incidental take authorizations for those activities will become increasingly contentious. If the Atlantic IHA process is any indication, NMFS will continue to be frozen by controversy and fail to meet its statutory obligations for future authorization processes involving offshore activities. Without amendments to the MMPA, there will be no accountability for such failures and the regulated community will be unable to reasonably carry out the work necessary to help the federal government fulfill OCSLA's requirements.

² A technical critique of the agencies' flawed, overly conservative approach, as reproduced in BOEM's ITR petition for Gulf of Mexico activities, is provided in Attachment B.

2. Arctic

The oil and gas industry has routinely applied for and received incidental take authorizations pursuant to the MMPA covering geophysical and other exploration activities in the Arctic OCS, by NMFS and FWS on a project-by-project basis (*i.e.*, IHAs) or through the issuance of ITRs and related letters of authorization. In the past decade, almost every MMPA ITR issued for Arctic oil and gas activities has been challenged by environmental advocacy organizations, and in every instance and on all counts, the authorizations have been upheld by the courts. The Arctic MMPA experience demonstrates the susceptibility of the MMPA and related federal approvals to litigation, as a result of ambiguous statutory language and unnecessary regulatory processes.

Specifically, various advocacy organizations challenged the FWS's 2006 Beaufort Sea ITRs, 2008 Chukchi Sea ITRs, and 2013 Chukchi Sea ITRs. Each of these lawsuits was litigated in the Alaska federal district court and appealed to the Ninth Circuit Court of Appeals. The plaintiffs asserted claims under the Administrative Procedure Act alleging violations of numerous provisions of the MMPA, including the "specified geographic area," "specified activity," "negligible impact," "small numbers," and "least practicable impact" standards. The plaintiffs also challenged related federal documents, such as biological opinions prepared pursuant to the ESA and environmental assessments prepared pursuant to NEPA. The most recent lawsuit challenging the 2013 Chukchi ITR was an expressly admitted attempt by advocacy organizations to block Shell's Chukchi Sea exploration program.

In all three cases, neither the Alaska district court nor the Ninth Circuit found merit in *any* of the claims raised by the advocacy groups. This track record of repeated MMPA ITR litigation in the Arctic strongly supports the notion that advocacy groups have leveraged their ability to challenge MMPA ITRs, and related documents prepared under the ESA and NEPA, as a means to attempt to block or impede lawful offshore oil and gas operations. Although these lawsuits have cost the courts, agencies, and applicants substantial time and money, they have accomplished no substantive result (other than delay, as intended by the advocacy groups).

When NMFS begins issuing MMPA authorizations for activities in the Atlantic OCS and the Gulf of Mexico OCS, it is reasonable to assume that a similar pattern of litigation will emerge. Certain environmental advocacy organizations have a well-established history of using the regulatory and litigation processes as means to attempt to impede and prevent any activities from occurring because they are fundamentally opposed to all offshore oil and gas activities (contrary to OCSLA's mandate). Indeed, the testimony of South Carolina State Senator Tom Davis states that "[t]he South Carolina Environmental Law Project will file a law suit to stop implementation and a restraining order to postpone [seismic] testing [in the Atlantic OCS] until the case can be heard." Clear statutory terms and the elimination of unnecessary processes would reduce the opportunity for the inappropriate use of litigation as a means to impede or prevent the "expeditious and orderly" development of the OCS.

In addition, the misguided intentions of environmental advocacy organizations in the Arctic have not only consistently failed in court, but the allegations upon which they are based have not borne out in the scientific record. For example, oil and gas seismic exploration activities

have been conducted in the Beaufort and Chukchi Seas of the Arctic Ocean for decades, with regular monitoring and reporting to NMFS pursuant to MMPA authorizations. During this lengthy period of acoustic exposures, and despite annual lethal takes by Alaska Natives engaged in subsistence activities, bowhead whales have consistently increased in abundance to the point that they are believed to have reached carrying capacity. Similarly, no effects of offshore exploration activities of which I am aware have been observed in Arctic ice seal, walrus, or polar bear populations. After decades of oil and gas exploration activities in the Arctic, there is no information demonstrating that any of the activities have had anything more than a *negligible* impact on marine mammal species. This finding has been repeatedly made by federal agency scientists in numerous public documents.

Finally, notwithstanding the successful legal defense of ITRs issued for Arctic offshore activities, the underlying regulatory processes for the issuance of Arctic ITRs have been riddled with bureaucratic delay. Arctic ITRs are typically issued 1.5 to three years after an ITR petition has been submitted. That time period does *not* include the often substantial pre-application communications and processes involving the agency and the petitioner. Because there are no MMPA timing requirements applicable to ITRs, there are no consequences for the delay.

C. The Negligible Impact of Seismic Activities

For over 40 years, the federal government and academic scientists have studied the potential impacts of seismic survey activities on marine animal populations and commercial fishing, and have concluded that any such potential impacts are insignificant. This conclusion has been publicly reaffirmed on multiple occasions by BOEM:

To date, there has been no documented scientific evidence of noise from air guns used in geological and geophysical (G&G) seismic activities adversely affecting marine animal populations or coastal communities. This technology has been used for more than 30 years around the world. It is still used in U.S. waters off of the Gulf of Mexico with no known detrimental impact to marine animal populations or to commercial fishing.

BOEM, Science Notes (Aug. 22, 2014), <http://www.boem.gov/BOEM-Science-Note-August-2014/>; *see also* BOEM, Science Notes (Mar. 9, 2015), <https://www.boem.gov/BOEM-Science-Note-March-2015/> (there has been “no documented scientific evidence of noise from air guns used in geological and geophysical (G&G) seismic activities adversely affecting animal populations”). These statements accurately summarize the best available scientific information regarding the potential effects of offshore seismic activities on marine life, and there are no other data to the contrary.

Indeed, the history of formal assessments of offshore seismic activities demonstrates that levels of actual incidental take are far smaller than even the most balanced pre-operation estimates of incidental take. More than five decades of worldwide seismic surveying and scientific research indicate that the risk of physical injury to marine life from seismic survey activities is extremely low. For example, as BOEM has concluded in a draft PEIS for Gulf of Mexico activities (DPEIS), “within the GOM, there is a long-standing and well-developed OCS

[oil and gas] Program (more than 50 years) and there are no data to suggest that activities from the previous OCS Program are significantly impacting marine mammal populations.” DPEIS at 4-77.

Finally, a 2016 report from the National Academy of Sciences, Ocean Studies Board (the “NAS Report”),³ makes the following findings regarding marine sound from seismic acoustic sources:

- “The National Research Council report Marine Mammal Populations and Ocean Noise (NRC, 2005) noted that: ‘No scientific studies have conclusively demonstrated a link between exposure to sound and adverse effects on a marine mammal population.’ That statement is still true” (NAS Report at 16);
- “Evidence of the effects of noise on marine mammal populations is largely circumstantial or conjectural” (NAS Report at 28); and
- “The probability of marine mammals experiencing PTS [injury] from anthropogenic activities will likely be sufficiently low as to preclude any population-level effects” (NAS Report at 35).

In sum, the claims, frequently made in the media by environmental advocacy organizations, that offshore seismic surveying has detrimental impacts on marine mammal populations, other marine species, and commercial fisheries are not supported by the best available information. Decisions regarding the implementation of the MMPA, and related federal processes, must be made based upon the best available information, not speculation or unsupported, politically motivated allegations.

D. Recommendations for Modernizing the MMPA

When it was enacted in the early 1970s (and subsequently amended), the congressional intent behind the MMPA was cutting edge and forward-thinking. However, as described above, decades of regulation and litigation have exposed some significant flaws in the MMPA. The primary flaws in the MMPA stem from (i) poorly written statutory language that creates ambiguity and uncertainty in the application of the MMPA’s legal standards, and (ii) procedural duplication and inefficiency. These flaws result in agency delay, overly conservative and inaccurate impact analyses, confusion by agencies and courts, and exploitation by environmental advocacy groups. Fixing some of the obvious flaws in the MMPA could result in tangible regulatory improvements that increase efficiency, decrease uncertainty and risk, and ultimately benefit all stakeholders and the implementing agencies. The following addresses some of the key problematic areas, as well as potential solutions.

³ National Academies of Sciences, Engineering, and Medicine. 2016. Approaches to Understanding the Cumulative Effects of Stressors on Marine Mammals. Washington, DC: The National Academies Press. doi: 10.17226/23479. <https://www.nap.edu/download/23479#>.

1. Substantive Recommendations

To issue an incidental take authorization under Section 101(a)(5) of the MMPA, the agency must show that the authorization will have no more than a “negligible impact” on marine mammal populations and result in “small numbers” of incidentally taken animals.

- **Problems:** (1) “Negligible impact” is not clearly defined; (2) “small numbers” is not defined at all; (3) there is significant overlap between these two ambiguous standards; and (4) the “small numbers” standard has no biological or otherwise scientific basis. These problems have led to regulatory uncertainty, inconsistent application by agencies, delay, and litigation.
- **Solution:** Create a redefined unambiguous “negligible impact” standard, and eliminate the “small numbers” requirement. A single, clear standard for authorizations would result in regulatory efficiency and predictability.

To issue an incidental take authorization under Section 101(a)(5) of the MMPA, the agency must require “other means of effecting the least practicable impact.” These “other means” typically take the form of mitigation measures included as conditions of the authorization.

- **Problem:** “Least practicable impact” is not defined in the statute or in the implementing regulations. As a result, it is not consistently applied by agencies, there is very little guidance for the regulated community, and, most recently, the phrase has been unreasonably and ambiguously interpreted by the Ninth Circuit Court of Appeals.
- **Solution:** Create a new, clear definition for “least practicable impact.” The definition should state that operational concerns and economic feasibility are primary factors in determining what mitigation is “practicable.”

The MMPA permits the authorization of incidental take by “harassment.”

- **Problem:** The definition of “harassment” is overly broad and ambiguous, and confusingly refers to “potential” harassment rather than actual harassment. This results in serious problems in the estimation of incidental take and unrealistic assumptions made by the implementing agencies.
- **Solution:** Redefine “harassment” to remove the word “potential” and to establish a more specific standard that provides better clarity for the agencies and the regulated community.

2. Procedural Recommendations

The process for issuing incidental take authorizations is routinely delayed by the implementing agencies. The current procedural requirements create little accountability for

agencies because they are either ambiguous or establish no consequences or solutions for unreasonably delayed agency action.

- **Solution #1:** Revise the procedural requirements to set clear and firm deadlines for each stage of the permitting process, and establish consequences for when agency deadlines are not met (*e.g.*, default approvals).
- **Solution #2:** Create a streamlined authorization process for certain low-effect, but common, activities (similar to the nationwide permit process under the Clean Water Act).

The MMPA creates a five-year limit on ITRs that requires applicants to petition for a new set of regulations every five years. This results in unnecessary and burdensome administrative processes that create frequent opportunities for litigation.

- **Solution:** Remove the five-year limit or, alternatively, create a simple and straightforward five-year renewal process.

Issues involving the overlap of the MMPA, the ESA, and NEPA have proven difficult for the agencies, the courts, and the regulated community. Because the MMPA sets the most rigorous conservation-oriented standards of all these statutes, additional reviews and administrative processes under the ESA and NEPA are often unnecessary and redundant.

- **Solution:** Make statutory revisions to minimize or eliminate duplicative ESA and NEPA review processes for certain MMPA authorizations. This would substantially increase regulatory efficiency.

E. SECURE American Energy Act

In an effort to begin to bring certainty and clarity to the MMPA and address some of the problems outlined in my testimony above, Representative Scalise (LA) has introduced the SECURE American Energy Act. By making smart changes to improve the efficiency and workability of the MMPA incidental take authorization process, the SECURE American Energy Act will help to facilitate the “expeditious and orderly” development of the U.S. OCS. The SECURE American Energy Act addresses many of the recommendations described above.

- The bill would set clear and firm deadlines for each stage of the MMPA authorization process. Failure to meet those deadlines would result in the approval of the requested authorization based upon the detailed information and proposed mitigation measures included in the IHA application. This would significantly reduce delays in the processing of IHA applications. The bill retains all existing opportunities for public involvement.
- Because IHAs expire after one year, project proponents must re-apply over multiple years, even if there is little or no change in the best available science. The bill would allow IHAs to be renewed without lengthy and needless agency review so long as there have been no significant changes to the underlying activity or the status of the relevant marine mammal stocks.

- The bill would remove duplicative federal agency processes involving the ESA. Again, this would result in no substantive change in the level of protection afforded to marine mammals because the MMPA’s standards are more stringent and protective than the ESA’s standards. This would greatly improve the efficiency of the regulatory process for issuing MMPA authorizations.
- The bill would eliminate the redundant, non-scientific “small numbers” requirement while retaining the “negligible impact” standard. This would provide clarity to NMFS and ensure that the applicable standard for MMPA authorizations is scientifically based upon potential impacts to marine mammal species or stocks.
- The bill would ensure that NMFS appropriately considers the feasibility of mitigation measures required for IHA applicants and that such measures meet the same standard applicable to “reasonable and prudent measures” imposed under the ESA.

F. Conclusion

Although well-intended at the time it was enacted many years ago, the MMPA’s ambiguous, outdated, and unclear language has proven unworkable for the issuance of incidental take authorizations for offshore activities. Changes to the statute, such as those described above, will significantly improve the regulatory process for both federal regulators and the regulated community. Contrary to statements made in the media, these changes will *not* substantively reduce the protections afforded to marine mammals and will retain all existing opportunities for public involvement in the regulatory process. Indeed, the only basis for opposing this bill would be an antagonism to efficient federal processes because inefficient processes and unclear standards create the opportunity to delay and block the development of the OCS. The basis for such opposition is, of course, directly contrary to OCSLA’s clear mandates.

IAGC believes it is unacceptable for seismic permit applicants to have to wait over two years for issuance of a simple IHA, when all the requisite environmental analyses, based on the best available science, have long since been completed. IAGC urges the Committee on Natural Resources to support and pass legislation to modernize the MMPA, including passage of the SECURE American Energy Act without delay.

Thank you for the opportunity to testify today.