TESTIMONY OF
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ON
H.R. 1769, A BILL TO AMEND THE MARINE MAMMAL PROTECTION ACT TO REDUCE PREDATION ON ENDANGERED COLUMBIA RIVER SALMON AND FOR OTHER PURPOSES

BEFORE THE
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON FISHERIES, WILDLIFE AND OCEANS
U.S. HOUSE OF REPRESENTATIVES

AUGUST 2, 2007

Madam Chair and members of the Subcommittee my name is Sharon Young and I am the Marine Issues Field Director for The Humane Society of the United States (HSUS). On behalf of The HSUS and its more than 10 million members and constituents -- one of every 30 Americans -- I am grateful for the opportunity to present our views on this well-intentioned but nevertheless controversial bill.

The HSUS must reluctantly oppose H.R. 1769. We recognize that this legislation seeks to address meaningful and real-world conflicts, and we do not question the motives of either Representative Baird or the tribes in advancing this legislation. We know they are frustrated about the pace of salmon recovery and that they are seeking to remove impediments to recovery. We understand that it is in the spirit of seeking solutions to a nettlesome problem that they offered this legislation.

I do wish to say, on behalf of The HSUS, that it is particularly hard for us to oppose legislation on wildlife or natural resource-related issues initiated by Rep. Baird. Rep. Baird, during his entire career in public service, has been a stalwart supporter of animal welfare and an ardent conservationist. We have long appreciated his support for a wide range of policy actions initiated by The Humane Society of the United States

That being said, we still must oppose this legislation, largely because we believe there are existing mechanisms in federal law to handle the sea lion-salmon conflicts and because the bill would establish a dangerous precedent in short-circuiting NEPA review and in opening up other possibilities for carve-outs for expanded lethal control of marine mammals.

Background on Section 120

In 1994, Congress enacted amendments to the MMPA, among which was Section 120 of the Act. The purpose of Section 120 was to provide a mechanism for addressing predation on endangered salmonids by individually identifiable pinnipeds who were having a significant adverse impact on the decline or recovery of the fish. This Section was itself the product of professionally facilitated multi-stakeholder negotiations that took place between 1992 and 1994. Interest groups represented in the negotiations included fisheries organizations, conservation and animal protection groups and representatives of both tribal interests and Alaskan natives. State and federal managers also attended a number of the negotiating sessions. I represented The HSUS in the negotiations. The groups suggested a process almost identical to that subsequently enacted as Section 120 of the MMPA.

The intent of this section was not to institute steps toward culling populations on a large or small scale, but rather to address situations in which the lethal removal of a small number of animals would end serious impacts that were causing declines or preventing recovery of endangered fish. In its report on this portion of the reauthorized MMPA, this Committee's predecessor, the Merchant Marine and Fisheries Committee, acknowledged that there may be instances in which species protected by the MMPA could be having a "significant adverse impact" on endangered fish stocks. The Committee also offered an important caution when it stated in its report that: "the Committee recognizes that a variety of factors may be contributing to the decline of these stocks, and intends that the current levels of protection afforded to seals and sea lions under the Act should not be lifted without first giving careful consideration to other reasons for the decline, and to all other available alternatives for mitigation." H.R. Rep. No. 439, 103rd Cong. (1994).

Section 120 provides a clear process for assuring external review of proposals to kill seals and sea lions and affords ample opportunity for public involvement in what Congress recognized as an issue of potential controversy---the intentional killing of beloved and iconic species of marine mammals. This Section of the MMPA demands that there be evidence that "individually

identifiable pinnipeds are having a significant negative impacts on the decline or recovery of salmonid fish stocks" and requires that the applicant demonstrate the ability to identify the individual pinnipeds for which lethal taking is sought along with the expected benefits of the taking 16 U.S.C. § 1389(b)(1), (2).

The Section contains timelines for action. It requires the Secretary of Commerce to determine within 15 days of the application whether there is sufficient evidence to warrant convening a Task Force to address the described situation. If he or she determines that the application warrants further consideration, a multi-stakeholder Pinniped-Fishery Interaction Task Force is to be established and public comment on the application is to be sought. Section 120 provides specific considerations that the Secretary and the Task Force must weigh. 16 U.S.C. § 1389(d). Within 60 days of the establishment of the Task Force, the Task Force is to recommend to the Secretary whether to approve or deny the application and, if it approves the application, to convey descriptions of the pinniped individuals and information on the location, time and method of the taking, criteria for evaluating success of the action and a recommended course of action. Within 30 days of receiving the recommendations of the Task Force, the Secretary is to either approve or deny the application. The Task Force is also charged with evaluating the success of any approved application and may recommend additional actions if it is deemed unsuccessful.

To summarize, Section 120 contains fairly short timeframes for expeditious response to applications (15 days), for task force review (60 days), and for approval or denial of applications (30 days). The only portions of the Section 120 process that do not have deadlines specified in the MMPA are the timeframe for establishing a Task Force once the Secretary has determined its need and the time period for public comment. All other portions of the process are required to be accomplished in slightly over 3 months time. Even the addition of expeditious time frames for public comment and establishment of the task force might add only an additional 60 days. The problem is not that the MMPA Section 120 process is "protracted" but that the National Marine Fisheries Service (NMFS), which is charged with its implementation, does not follow the deadlines that are established in the Act.

For example, in this case, the states of Washington, Oregon and Idaho submitted an application to NMFS with a letter dated November 13, 2006, and reported on by the Associated Press by November 27. Yet in its Federal Register notice, 72 Fed. Reg. 4239 (Jan. 30, 2007), NMFS states that it "received an application" on December 5, 2007. This discrepancy in dates is not explained. Despite Section 120's mandate to make a finding on the sufficiency of the application within 15 days of receipt of an application, the Federal Register notice that published this finding did not appear until January 30, 2007. This is close to two months after NMFS claims to have received the application – and even longer if the date reported by the Associated Press is correct -- not the 15 days that the MMPA stipulates. The public comment period on the Application closed on April 2, 2007. The NMFS still has not convened a Pinniped-Fishery Interaction Task Force.

In response to correspondence from you, Madam Chair, requesting an explanation for the delays, Secretary Gutierrez responded that "NMFS is working on the application as required by the MMPA." Yet it has missed its statutory deadline by many months, causing the perception of a "protracted process" that NMFS itself created in violation of the MMPA. I was told by regional office staff of NMFS that the failure of NMFS to convene a task force following close of the public comment period was largely a result of the desire of state and federal biologists to have a fairly uninterrupted summer field research season. Far from treating this situation with the urgency that the applicants and this Bill's sponsors identify, the NMFS has flouted deadlines established to assure timely processing of applications. Had NMFS followed deadlines established in Section 120, the task force meetings would likely have concluded and recommendations would have been forwarded to NMFS by now.

Rather than amend the MMPA, Congress needs to insist that the NMFS take its statutory obligations seriously.

Concerns with H.R. 1769

It is not clear to us that the Bill can accomplish its stated purpose of promoting the recovery of endangered salmonids. We are also concerned that it stipulates a process that may seriously undermine other key environmental legislation.

Addressing Predation and Its Effect on Fish Recovery in Context with Other Factors

The number of California sea lions is increasing, though apparently not to the level of 300,000 animals as has been asserted. The Bill proposes an upper limit on lethal take based on 1% of the Potential Biological Removal (PBR) level for California sea lions. The most recent draft of the National Marine Fisheries Stock Assessment for California sea lions states that the PBR was calculated based on a population estimate of 141,842; this is less than half of what has been alleged.

We acknowledge that California sea lions are eating endangered salmon near Bonneville Dam. The findings in the Bill do not quantify the predation, but merely state that it is increasing. To provide some perspective, we wish to offer that the states of Washington, Oregon and Idaho have stipulated in their Section 120 application that California sea lions are estimated to be consuming 4% or less of the returning runs in the Columbia River, or approximately 3,000 fish. It is not clear that this level of predation is having a significant negative impact on the decline or recovery of the fish runs in the Columbia River.

To provide some context to the impact of this rate of predation on the decline and recovery of the fish, we would like to offer facts from a number government reports. Some of the fish stocks in question have been stable or even increasing to some degree even in the face of predation. For example NMFS has stated that lower Columbia Coho have shown recent increases in natural spawners, and several stocks (e.g., Upper Columbia spring-run Chinook, Snake River Spring/Sumer Chinook, Upper Willamette River Chinook) have shown stable or increasing passage numbers. 70 Fed. Reg. 37,160 (June 28, 2005). The most recent report by the Bonneville Power Administration states that indices of increased juvenile survival in spring run salmon bode well for the future and stated that the prospects for adult returns of spring Chinook salmon in 2008 and beyond “appear bright.” (BPA 2007) These stable or increasing trends have occurred within the same time frame that predation is stated to have been increasing. This would imply that the fate of the fish is largely independent of the predation.

Further, some of the fish stocks identified by the states are also caught by trawl fisheries in Alaska. In its 2006 ESA Biological Opinion on the Bering Sea, Aleutian Islands and Gulf of Alaska trawl fisheries (BSAI 2006), NMFS stated that, among other species of salmon, these fisheries incidentally capture Upper Willamette River Chinook, Lower Columbia River Chinook and Upper Columbia River Chinook. The NMFS estimated that the fisheries caught 237,584 Chinook of various stocks between 2001 and 2005. In contrast to this enormous number, the 3,000 fish estimated by the states to be eaten each year by pinnipeds pales in comparison. Fisheries organizations themselves estimate that salmonids from runs designated as Endangered and Threatened are harvested by licensed fishermen at rates as high as 50% of some runs in many years, and one indicator run of Chinook was harvested at 60% between 1999 and 2003 (NWRP). This contrasts to the less than 4% per year being eaten by pinnipeds. A 2006 expose by the Wall Street Journal found some of these endangered fish being sold for high prices at restaurants in Seattle. Fisheries catch and bycatch of the salmon appears to be a greater problem to the fish than the predation.

It is not as clear as the Bill would make it appear, that the problem of predation by sea lions is a severe impediment to the recovery of fish. Other mitigable factors would seem to be more important to address.

Section 120 of the MMPA exists as a mechanism to address predation by individually identifiable seals and sea lions who have developed a unique foraging strategy that is imperiling endangered fish. It is not intended as a gateway to allow wholesale or arbitrary removals of marine mammals who will simply be replaced by others who move into their territory to take their place once they have been killed. The Bill ignores this likely result. Speeding the approval process to kill sea lions will not speed recovery of the fish.

Effects on Key Environmental Legislation

Rather than a carefully considered, scientifically based and transparent approach to considering the killing of beloved mammals, the Bill would circumvent longstanding legislative safeguards. The process proposed by HR 1769 would seriously undermine other legislation that has been critical to assuring that action proposals do not adversely or irretrievably alter the ecosystem or thwart important public review. To enact its provisions, it would exempt killing pinnipeds in the Columbia River from the MMPA Section 120 process and from the National Environmental Policy Act (NEPA).

In addition to allowing state, certain tribes and federal managers to apply to kill sea lions, the Bill extends the authority to kill sea lions by allowing permitted "entities" in turn to delegate authority for lethal force to other tribal and fishery councils. The Bill also limits public review. The Secretary has only 90 days after legislation is enacted to determine whether "alternative measures" to protect salmonids in the Columbia and its tributaries are reducing predation adequately. Within that same 90 day period the public has a 30-day comment period allotted to it for comment. There is no requirement to consult with the Marine Mammal Commission, nor does this bill mandate any outside review prior to the Secretary's approval. It merely mandates consultation with very entities applying to kill sea lions (Section 3(a)(4)(C)).

Under the proposed amendment, The Secretary may issue multiple permits to kill up to 1% of the PBR for California sea lions each year, with each permittee allowed to kill up to 10 sea lions. At this time, this means that 85 sea lions could be put to death each year. Rather than either providing or requiring a justification for the number of animals to be killed, as is required under the existing Section 120, the Bill provides no rationale for choosing 1% of the PBR of California sea lions as an upper limit of tolerable predation. It provides no link whatsoever between the rate of predation and the number of sea lions it would permit to be killed.

For purposes of predation in the Columbia River, it will eliminate the provisions under Section 120 that would otherwise require NMFS to convene a task force comprised of scientists and a variety of stakeholders. Task force review ensures that the American public is represented in decision making that would affect public trust resources and it helps guarantee that proposals rely on the best available science. Outside review of proposed actions is precluded by this bill. The Secretary is merely mandated to consult with "eligible entities" (i.e. permit applicants) and "other such entities as the Secretary considers appropriate, including the Corps of Engineers."

We are concerned that the bill specifically exempts the process of granting permits to kill the sea lions from NEPA (Section 3(a)(6)). The language in the bill states that this foreclosure of the review process is done because the current process "will not work in a timely manner." Exempting this process from NEPA review is not only inappropriate, but it sets a dangerous precedent. With this precedent, other varied projects in the future may be proposed as similarly needing "expedited procedure" if the proponents wish quicker action than longstanding environmental laws and requirements for public involvement would otherwise allow.

As we noted above, at the time that the authorizing language for what became Sec. 120 was inserted in the MMPA, the Committee report stated that it was not the Committee's intent to blithely lift current levels of protection for marine mammals. We believe that this bill does just that. The Section 120 process requires the use of sound science and mandates public participation

and review of actions that would result in the intentional killing of sea lions, who have been individually identified as contributing to declines of endangered fish. Instead, this Bill would substitute a process that drastically curtails public comment and allows killing of close to 100 random pinnipeds annually who spend time in the river where salmon are migrating. At the same time it exempts this process from complying with what is arguably among the most important pieces of environmental legislation that assures the use of the best science and independent review of project and policy proposals.

The Failure of NMFS to Act in a Timely Manner to Recover Endangered Fish

The NMFS has been castigated in court decision after court decision for its failure to take meaningful action to protect endangered and threatened stocks of salmon. Even the Chairman of the White House Council on Environmental Quality issued a statement criticizing agency inaction with regard to managing harvest levels and other failure to curtail practices that impede recovery. (Craig 2006) If the states and NMFS believe that predation is having an effect on recovery, the Section 120 process exists to address it. The "protracted" nature of the process is not a result of a failure in the MMPA. It is instead entirely the result of the failure of the NMFS to uphold its obligation to meet deadlines mandated in the MMPA. The Section 120 task force should be allowed to meet and judge this situation on the basis of the precautionary considerations and metrics set up under Section 120. If Congress acts to promote recovery of the fish, it should act to force the agency to meet its responsibilities under the Endangered Species Act to take more effective action to recover salmon.

Because the HSUS cares about both the pinnipeds and the salmon, we want to see meaningful action taken to promote recovery. We do not believe that this Bill can contribute to recovering salmon. And we are concerned that it sets a dangerous precedent for circumventing key environmental legislation.

Thank you for allowing us to testify on this bill. I welcome the opportunity to work with concerned groups and individuals to identify steps targeted to the most effective strategies for recovering fish without weakening existing legislation to protect animals and their ecosystems.

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