February 26, 2025

Rep. Harriet Hageman (R-Wyo.),
Chair Natural Resources Subcommittee on Water, Wildlife and Fisheries
1227 Longworth House Office Building, Washington, DC

RE: Oversight Hearing, "Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act"

Dear Chair Hageman,

EnerGeo Alliance applauds your efforts to provide oversight on the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA), early in the 119th Congress. It is imperative that the legislative branch provide oversight and consider modernizing legislation on a regular interval, unfortunately, for both the MMPA and ESA this has not been the case. We urge careful review of these outdated statutes and swift adoption of provisions to modernize the laws.

Founded in 1971, the EnerGeo Alliance is a global trade association for the energy geoscience industry, the intersection where earth science and energy meet. Providing solutions to revolutionize the energy evolution, the EnerGeo Alliance and its member companies span more than 50 countries, representing onshore and offshore survey operators and acquisition companies, energy data and processing providers, energy companies, equipment and software manufacturers, industry suppliers, service providers, and consultancies. Together, our member companies are the gateway to the safe discovery, development, and delivery of mainstay sources of energy, alternative energy, and low-carbon energy solutions that meet our growing world's needs.

When it was enacted in the early 1970s (and subsequently amended), the congressional intent behind the MMPA was forward-thinking and appropriate for the time and identified problems. However, decades of regulation and litigation have exposed some significant flaws in the MMPA. Fixing these flaws would increase regulatory efficiency, decrease uncertainty and federal government costs, and ultimately benefit all stakeholders and the implementing agencies.

The primary flaws stem from poorly written statutory language that creates (1) ambiguity and uncertainty in the application of the MMPA's legal standards, and (2) procedural inefficiency. Fixing some of the most obvious flaws in the MMPA could result in tangible regulatory benefits. Our letter addresses some of the key problematic areas and we look forward to working with you to ameliorate those issues.

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Geoscience surveying has been and continues to be essential to achieving the Outer Continental Shelf Lands Act's (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 or a single energy source is developed.

Offshore geoscience 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 geoscience survey permitting process.

In the past decade, these problems have manifested in routinely delayed permitting processes, inconsistent and misguided analyses of potential impacts, and opportunistic advocacy litigation intended to block or impede offshore development.

For example, in the Gulf of America, BOEM requires an MMPA authorization from NMFS prior to the issuance of a geoscience permit under the current Incidental Take Regulation (ITR). During the rulemaking process, industry pointed out mathematical errors in the ITR that was originally promulgated January 2021. As discussed further below, it took BOEM and NMFS an additional three years to re-evaluate the original analysis before NMFS amended the ITR in 2024, ultimately making few changes. This revision process was just one of many delays in the history of the Gulf ITR that contributed to the steady decline of geoscience surveys mapping the Gulf of America since at least 2014.

In Alaska, unnecessary and unexplained delays in processing MMPA authorizations prevent planned geoscience surveys from providing the timely insight that would update resource estimates. Currently, at least one petition for MMPA authorization has stalled for more than two years preventing updated insight into the resource potential on Alaska's North Slope.

In the Atlantic, approximately 40 years have passed since the potential hydrocarbon resource base 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

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

other geophysical surveys used to characterize the seabed and subsurface for suitability of offshore wind energy facilities. Six companies applied to BOEM for permits to conduct seismic surveying in the Atlantic OCS—a process that started in 2011, when the first permit application was filed, and ultimately ended in 2018 after nearly six years of working to obtain MMPA authorizations from NMFS.

Problematic MMPA provisions that provide negligible added protection for marine mammals:

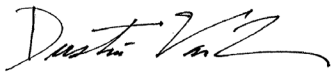
- To issue an incidental take authorization under Section 101(a)(5) of the MMPA, the agency must show that the authorization will have no more than a negligible impact on marine mammal populations and result in only small numbers of incidentally taken animals. "Negligible impact" is not clearly defined; (2) "small numbers" is not defined at all; and (3) there is significant overlap between these two ambiguous standards. These problems have led to regulatory uncertainty, inconsistent application by agencies, and much litigation.
- To issue an incidental take authorization, 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. "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 interpreted by the Ninth Circuit Court of Appeals.
- The MMPA permits the authorization of incidental take by harassment. 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.
- 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.
- The MMPA creates a 5-year limit on "incidental take regulations" that requires applicants to petition for a new set of regulations every 5 years. This results in unnecessary and burdensome administrative processes that create frequent opportunities for litigation.
- Issues involving the overlap of the MMPA, the Endangered Species Act (ESA), and the National Environmental Policy Act (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.

The energy geoscience industry is in the business of minimizing the footprint of energy activity by pinpointing where the resource is and importantly where it is not. Armed with reliable data and analysis, companies and policymakers are able to identify and prioritize high-

density, low-carbon-intensive energy sources closer to existing infrastructure and the end user, locating where offshore wind facilities are best suited for harnessing the energy from wind, prolonging the life of existing natural gas and petroleum assets, and making it possible to store carbon beneath the surface. Geoscience surveys provide the information governments and policymakers need to make informed decisions in the best interest of their citizens regarding accessing mainstay energy and alternative sources, as well as developing low-carbon strategies. Currently, those data acquired by our members make it possible for BOEM to publish resource assessments. Nations cannot develop and provide opportunities for energizing their economies without the geoscience industry, let alone implement their energy evolution goals to make reliable, affordable energy available to their citizens and meet Net Zero Emissions (NZE) policy ambitions.

We strongly support efforts to modernize the MMPA, which will help to ensure more rigorous and comprehensive assessments of U.S. energy supplies and a more efficient and predictable process for permitting geoscience surveys. The energy geoscience and exploration industry stands ready to partner in the discovery and development of energy dense, low emissions sources of energy to power the world. Streamlining the permitting process along with reducing the ability for outside special interest groups to obstruct energy geoscience exploration is a necessary step to ensure our continued development of energy resources and low-carbon solutions for future generations in the U.S. We appreciate your focus on these important matters to enhance the country's energy development through common-sense modernization of the MMPA and ESA

Sincerely,



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