Testimony of W. Parker Moore, Environmental Attorney,

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"Evaluating the Implementation of the Marine Mammal Protection Act and the Endangered Species Act"

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Testimony

Thank you for inviting me to testify at this hearing. My name is W. Parker Moore, and I am a principal at the law firm of Beveridge & Diamond, P.C. Although I represent a variety of clients on protected species issues under both the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA), I am appearing here today solely in my personal capacity. The views I express today are my own. I am not representing my law firm, any client of my law firm, or any other party.

I have extensive experience with both the ESA and the MMPA. I have been advising clients on legal issues that arise under both statutes for over 20 years. In addition, before becoming a lawyer, I served as a wetlands and species ecologist for an environmental consulting firm, during which time I worked on a variety of at-risk species issues. Over the course of my career, I have had a front row seat to the continuously evolving implementation of the federal species protection laws and been on the battle lines as each successive administration works to advance its priorities under them. But for all the differences among the administrations, one thing has remained very much the same over the years: regulatory agency overreach and an incompatible permitting system. Today, I would like to share with you just two of the many recent examples of these problems under the ESA and MMPA and then offer simple ideas for fixing them.

I. Agency Overreach Under the ESA and MMPA: The Vessel Speed Rules

The ESA and the MMPA each grant the U.S. Fish and Wildlife Service (USFWS) (through the Department of the Interior) and NOAA Fisheries or "NMFS" (through the Department of Commerce) significant authority to promulgate regulations needed to administer the statutes. Unfortunately, at times, the agencies have stretched that authority beyond reason.

Section 112(a) of the MMPA provides that "[t]he Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subchapter." 16 U.S.C. § 1382(a). While the phrase "necessary and appropriate" generally is interpreted broadly, it is not limitless. Among other things, Congress made clear that the agency rulemaking authority is confined to issuing regulations that are necessary to administer Subchapter II of the MMPA. Congress used Subchapter II for many important things – establishing a moratorium on taking marine mammals, imposing strict prohibitions on unauthorized take, creating an incidental take permitting program, codifying a detailed framework for regulating federally-jurisdictional commercial fishing operations, and incorporating specific penalty and enforcement provisions – each of which is set forth in great detail. *Id.* §§ 1371-1389.

Section 11(f) of the ESA is even narrower. That provision states in pertinent part that "[t]he Secretary [is] authorized to promulgate such regulations as may be appropriate to enforce this chapter . . . ." 16 U.S.C § 1540(f). Thus, the plain language of this provision explicitly limits the agency rulemaking authority to regulations that will further statutory enforcement.

Notwithstanding the limitations on agency regulatory authority that Congress articulated in Section 112(a) of the MMPA and in Section 11(f) of the ESA, the agencies have acted to broaden

their authority over time through the rulemaking process. A now-infamous example of this is NMFS's imposition of a 10-knot speed limit on tens of thousands of boats traveling across huge swaths of the Atlantic Ocean – ostensibly to reduce the possibility that those boats might collide with the endangered North Atlantic Right Whale (NARW).

NMFS first promulgated this regulation in 2008, calling it the *Final Rule to Implement Speed Restrictions to Reduce the Threat of Ship Collisions with North Atlantic Right Whales*. 73 Fed. Reg. 60173 (Oct. 10, 2008) ("Vessel Speed Rule I"). Under Vessel Speed Rule I, NMSF designated ten "Seasonal Management Areas" (SMAs) between Massachusetts and Florida and imposed a 10-knot speed limit on virtually all private boats 65' or longer traveling within one of those SMAs when a NARW might be passing through the area.

The SMAs are not small, and the time period when the 10-knot speed limit applies within them is not short. Nor is the number of boats affected trivial. Together, the SMAs span tens of thousands of square miles of ocean off of the Atlantic Coast. The speed limit applies for 5 months or more in much of that area. And there are thousands of boats affected by this each year. In contrast, NMFS estimated that there were only 313 NARW in the western Atlantic Ocean when it issued this rule, making it exceedingly unlikely any boat subject to the rule ever would encounter a right whale. Nevertheless, NMFS determined that "a rule to limit vessel speeds in times and areas where right whales are most likely to occur is necessary." 73 Fed. Reg. at 60174.

During public review on the proposal to issue Vessel Speed Rule I, a commenter questioned NMSF's authority to promulgate and enforce a regulatory speed limit intended to reduce the mere possibility of impacts to protected whales. *Id.* at 60182. NMFS assured the commenter that Congress empowered the agency to promulgate the prophylactic regulation under its general rulemaking authorities in Section 112(a) of the MMPA and Section 11(f) of the ESA. *Id.* NMSF's assurances notwithstanding, there is ample evidence that neither NMFS nor Congress believed the agency's regulatory authority extended so far.

On numerous occasions since 2000, Congress has considered statutory amendments specifically to empower NMFS with the prophylactic rulemaking authority that the agency maintained it already had when it issued Vessel Speed Rule I in 2008. For example, in 2003, the Bush Administration proposed an MMPA reauthorization bill that, among other things, would have authorized NMFS to issue regulations, like speed restrictions, aimed at reducing the potential for vessel collisions with whales. During the corresponding Senate Hearing on the so-called *Future of the Marine Mammal Protection Act*, agency witnesses testified specifically on this issue. S. Hrg. 108-981 (July 16, 2003). Those witnesses plainly recognized that NMFS had no such authority and, therefore, requested a statutory amendment to provide it:

- Dr. Rebecca Lent, Deputy Assistant Administrator for Fisheries at NMFS, testified that "[t]he bill provides authorization to use authorities to reduce the occurrence of ship strikes on whales, a very big concern for right whales." Dr. Lent further testified that "[t]he Administration bill would authorize the Secretary to use the various authorities available under the MMPA to reduce the occurrence of ship strikes of whales and to encourage the development of methods to avoid ship strikes." *Id.*

- David Cottingham, Executive Director of the Marine Mammal Commission, a body established under the MMPA to advise NMFS on implementing the statute, testified that "[t]he Administration bill highlights the ship strike issue as one requiring priority attention. One of the difficulties impeding progress in addressing this source of mortality is a lack of agreement concerning the existing legal authorities that can be brought to bear on the issue." *Id.*

Notwithstanding these requests to amend the MMPA to authorize NMFS to regulate boat speed in the name of whale protection, Congress did not pass the bill.

In the years following NMFS's failed attempt to expand its MMPA rulemaking authority, several bills were introduced in both the U.S. Senate and the U.S. House of Representatives to grant the agency regulatory authority to restrict boat speeds. *See*, *e.g.*, S. 2657 (2008) (proposed amendment to require NMFS to issue a rule imposing boat speed limits and to codify that rule under the MMPA); H.R. 5536 (2008) (same); H.R. 5957 (2021) (proposed amendment to authorize NMFS to develop and implement boat speed limits remarkably similar to the Vessel Speed Rule). But each time the measure failed. There is no plausible reason that an agency would request a statutory amendment to provide it with authority it already has. Nor is there a plausible reason that Congress would repeatedly consider amending a statute to grant an agency power that already exists. The only rational explanation is that NMFS does not have the rulemaking authority it claims.

Despite lacking the statutory authority to develop and implement prophylactic regulations like Vessel Speed Rule I, NMFS faced enormous pressure from environmental groups to expand the rule even further. In 2012 and again in 2020, a coalition of environmental groups petitioned NMFS to broaden the scope of the speed limit regulations dramatically to cover an even larger area of the Atlantic Ocean and tens of thousands of more boats. When NMFS did not immediately grant those petitions, the coalition sued, alleging the agency unreasonably delayed acting. *Whale and Dolphin Conservation v. NMFS*, No. 21-00112 (D.D.C. Jan. 13, 2021). To its credit, NMFS initially fought that lawsuit. But as litigation continued into the following year, NMFS eventually gave in to the environmental groups' demands, and on August 1, 2022, it issued the proposed *Amendments to the North Atlantic Right Whale Vessel Strike Reduction Rule*, 87 Fed. Reg. 46921 (Aug. 1, 2022) ("Vessel Speed Rule II").

NMFS's proposed Vessel Speed Rule II was breathtaking in scope. Under the proposal, NMFS sought to establish five enormous Seasonal Speed Zones (SSZs) that would blanket the Atlantic Ocean from the East Coast to as far as 90 miles offshore, a total area spanning tens of thousands of square miles, and expand the applicability of its 10-knot speed limit in those areas to cover all boats 35' and longer for up to seven months of each year. Yet again, NMFS claimed Section 112(a) of the MMPA and Section 11(f) of the ESA gave it the power to promulgate such a rule. 87 Fed. Reg. at 46934. But, again, they do not.

What is more, NMFS's sweeping proposal was as unnecessary as it was unauthorized. There simply was no scientific or factual basis for the agency to expand the 10-knot speed limit to restrict the travel of an additional 63,000 boats each year across virtually the entire eastern seaboard.

The waters off the coast of South Carolina provide a perfect example of this. Under proposed Vessel Speed Rule II, NMFS sought to establish a massive new restricted speed area (the "South Carolina SSZ") encompassing nearly 6,600 square miles that would apply to all boats 35' and longer traveling within it from November 1 to April 15 each year. But NMFS was unable to identify a factual basis for instituting such a restriction off of the South Carolina coast. Indeed, the agency's proposal identified just a single recorded NARW collision as having ever occurred anywhere in the waters off South Carolina. That isolated incident occurred nearly 15 years ago, the vessel involved was more than 65 feet long, and the vessel's speed is unknown. In other words, NMFS claimed it was necessary to create the South Carolina SSZ and impose a draconian speed limit on all 35' – 65' boats within it to protect NARWs, but it could not identify even a single instance of one of those boats having ever collided with a right whale while traveling *at any speed* in the waters off the South Carolina coast. The proposal therefore was guarding against something that had never happened before in recorded history.

Nor was there any reason to think it could happen in the future. NMFS's own modeling accompanying the proposed rule predicted a microscopic mortality risk of 0.00000 to 0.00003 from all boats (including those >65') across the overwhelming majority of the South Carolina SSZ. *See* NOAA Technical Memorandum NMFS-SEFSC-757, Assessing the risk of vessel strike mortality in North Atlantic right whales along the U.S. East Coast, at 30-35 (May 2022).

That disconnect between reality and the proposed rule was not limited to only South Carolina's waters, however. Based on NMFS's own data, since 2017, there have been at most six NARW collisions anywhere between Ossabaw Island, Georgia and Elberon, New Jersey that *even potentially* involved a 35'-65' boat. During that same period, there were an estimated 5.1 million *recreational fishing* trips by boats of that size in those same waters. Given that those trips represented just a fraction of the total trips by all boats of that size through those areas, there is at best a one-in-one million chance of those boats colliding with a right whale for the majority of the U.S. coast. In other words, in any given year, a boater is significantly more likely to be struck by lightning than to strike a right whale.

That NMSF relied on authority it does not have to solve a problem that does not exist is bad enough. But it did so while ignoring the consequences of its actions. The agency claimed that the proposed rule would cause roughly $1 million in impacts to recreational boating interests nationwide. NMFS, 2022 Draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis ("RIR"), at 34. To calculate that financial impact, NMFS simply estimated the total number of delay hours boaters would experience under the rule from having to travel at the speed of a typical golfcart and then multiplied those hours by the national average hourly wage rate of $28.20. RIR, Appendix A, at 11. That was it. Inexplicably, the agency never investigated or

accounted for the real-world implications of the rule. Had it done so, it would have understood that the rule would have made recreational offshore fishing impossible along the majority of the eastern seaboard, decimated the recreational boating, fishing, and tourism industries across much of the Atlantic Coast, and caused billions of dollars in losses.

For these and other reasons, there was immediate and vocal opposition to the proposed rule. The opposition was not confined to any location, economic sector, or political persuasion. In addition to boating and fishing interests, the proposal was fought by virtually every other industry and chamber of commerce with any connection to marine activities, along with mayors, governors, and state and federal lawmakers. The objections were numerous, well-reasoned, and sustained. They came from across the country and from both sides of the aisle. All told, the agency received over 90,000 comments on the proposal. Eventually, NMFS could no longer ignore the writing on the wall. Faced with a near certain Congressional Review Act challenge, last month NMFS quietly published notice that it was withdrawing the proposal, explaining that it did not have enough time to finalize the rule before the Trump administration took office. 90 Fed. Reg. 4711 (Jan. 16, 2025).

While the proposed Vessel Speed Rule II is gone for now, Vessel Speed Rule I remains in place. Over the past year, NMFS has relied on that rule to fine the operators of 65'+ boats $15,000 to $30,000 each time they allegedly exceeded the 10-knot speed limit in one of the massive restriction zones regardless of whether a right whale was present anywhere in that zone. Moreover, there is every indication that NMFS intends to make another run at promulgating Vessel Speed Rule II as soon as a more favorable Presidential administration is in office. And there is no reason to believe that NMFS will not try to similarly regulate other private activities across the nation with unjustified rules aimed not at prohibiting and preventing actual statutory violations, but at avoiding a hypothetical violation that might occur only if many highly unlikely circumstances were to arise simultaneously.

To put it bluntly, precautionary rulemaking like the Vessel Speed Rules is regulation run amok. Congress never intended it, and the ESA and MMPA do not authorize it. But NMFS's actions demonstrate that this needs to be made explicit in both statutes. It is imperative to correct course so that the agencies entrusted with conserving protected species can refocus their attention on accomplishing that important goal.

II. Incompatible Permitting under the ESA and MMPA

The ESA and the MMPA are designed to protect and conserve at-risk species and marine mammals. Congress enacted the MMPA in 1972 because "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1). In enacting the MMPA, Congress recognized that many marine mammal species were depleted or threatened by human activity and that "such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part." 16 U.S.C. § 1361(2). Congress enacted the ESA the following year to "[p]rovide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a

program for the conservation of such endangered species and threatened species." 16 U.S.C. §1531(b).

But Congress also recognized that it would be infeasible to accomplish these important goals under the ESA and the MMPA by simply prohibiting all impacts to those species at all times and from every activity. As a result, while both statutes strictly prohibit unauthorized "take" of the species they protect, they also provide mechanisms to apply to USFWS and NMFS (together, "the Services") to authorize species impacts that are incidental to otherwise lawful activities. By including these permitting mechanisms in the statutes, Congress intended to create an effective conservation framework without unreasonably impeding the innumerable private, commercial, and governmental needs that arise each day across this country. Unfortunately, it has become increasingly clear that the permitting mechanisms under the two statutes are incompatible when the species at issue is a marine mammal that also is listed as threatened or endangered under the ESA. At the root of this problem are two statutory provisions: Section 7(b)(4)(C) of the ESA (16 U.S.C. § 1536(b)(4)(C)) and Section 101(a)(5) of the MMPA (16 U.S.C. § 1271(a)(5)).

By way of background, Section 9 of the ESA, together with the Services' ESA regulations, prohibits the unauthorized "take" of threatened and endangered species. 16 U.S.C. § 1538(a)(1)(B). ESA compliance for activities that will take a listed species can be achieved in two ways. For activities with a federal nexus (i.e., activities requiring a federal permit, taking place on federal lands, or relying on federal funds), compliance is achieved through Section 7 of the ESA (16 U.S.C. § 1536(a)(2)). Under Section 7, before the activity may be approved, the federal authorizing agency must consult with one or both of the Services to ensure that allowing the proposed activity to proceed would not "jeopardize the continued existence" of any threatened or endangered species. Upon making that "no jeopardy" determination and completing Section 7 consultation, the Services will issue an incidental take statement (ITS), which exempts the anticipated impacts to the listed species from the ESA's take prohibition. That exemption functions much like a permit by making any species take that occurs lawful.

For activities that do not have a federal nexus, ESA compliance is achieved by obtaining an incidental take permit (ITP) from the Services under Section 10 of the statute (16 U.S.C. § 1539(a)(1)(B)). An ITP authorizes take of the listed species so long as certain requirements are met, including that the permitted impacts "would not appreciably reduce the likelihood of the survival and recovery of the species in the wild." *Id.* § 1539(b)(2)(B). Although ITPs are issued under Section 10 of the ESA, the Services have taken the position that the issuance of an ITP is itself a federal action that triggers Section 7 consultation. As a result, even though Section 7 consultation explicitly is reserved only for federal activities and Section 10 permits are available only for non-federal activities that will not significantly impair a species' overall population health, the Services curiously have concluded that they must consult with themselves under Section 7 before they may issue an ITP under Section 10. Rightly or wrongly, that means that before the Services issue an ITP or an ITS authorizing or exempting take of a threatened or endangered species, they first must complete Section 7 consultation and determine that the proposed activity will not "jeopardize the continued existence" of the species.

That the ESA compliance mechanisms for every activity, whether federal or non-federal, involve Section 7 consultation is particularly consequential when the listed species at issue also is a marine mammal. This is because, pursuant to Section 7(b)(4)(C) of the statute, after completing a Section 7 consultation, the Services may not issue an ITS exempting take of a threatened or endangered marine mammal under the ESA unless the Services already have issued a separate incidental take permit for that species under Section 101(a)(5) of the MMPA. 16 U.S.C. § 1536(b)(4)(C). This is where the incompatibility arises between the take authorization provisions of the MMPA and the ESA.

The MMPA prohibits take of any marine mammal that has been designated as "depleted," except under an incidental take authorization issued under Section 101(a)(5) of the statute. The MMPA provides two options for such authorizations. First, the Services may issue an "incidental harassment authorization" for activities that will harass a marine mammal through injury or disturbance for a period of up to one year. 16 U.S.C. § 1371(a)(5)(D). Second, for activities lasting more than a year or having the potential to seriously injure or kill a marine mammal, the Services may permit the impact by issuing a "letter of authorization." *Id.* § 1371(a)(5)(A)(i). But this letter of authorization approach is available only if USFWS or NMFS already has promulgated a regulation removing that species from the MMPA's moratorium on taking marine mammals. *Id.* It is this second type of MMPA authorization that is incompatible with Section 7 of the ESA.

This statutory incompatibility results from Section 7(b)(4)(C), which, as explained above, prohibits the Services from issuing an Endangered Species Act incidental take statement for a threatened or endangered marine mammal unless the take-causing activity separately has received incidental take authorization under Section 101(a)(5) of the Marine Mammal Protection Act. That means that even though the Services have concluded that an activity will not jeopardize the species and is otherwise consistent with the requirements of the ESA – the statute Congress enacted specifically to protect, conserve, and recover imperiled species – the activity still cannot proceed without an MMPA authorization simply because the species also happens to be a marine mammal. Given the legislative intent underlying the ESA, such redundancy is unnecessary. More importantly, however, it is unworkable.

At best, requiring a proposed activity to undergo ESA Section 7 consultation and separately receive an MMPA incidental take authorization adds significant unnecessary cost and time. Completing formal consultation under Section 7 of the ESA typically takes more than six months and can cost the proponent of the activity hundreds of thousands of dollars. Requiring separate MMPA authorization makes the situation even worse because completing that process generally requires an additional nine to eighteen months or longer. But this "best case" scenario is achievable only if USFWS or NMFS already has promulgated a regulation under the MMPA removing that species from the statute's moratorium on marine mammal take.

At the other end of the spectrum is the worst case scenario under which no MMPA authorization is available at all. That situation arises anytime the species at issue is an ESA-listed

marine mammal for which USFWS or NMFS has not promulgated a regulation exempting the species from the MMPA's moratorium on species take. Absent such a regulation, Section 101(a)(5) of the MMPA prohibits the Services from issuing an incidental take authorization for the activity. That, in turn, means that the activity cannot satisfy Section 7(b)(4)(C) of the ESA and the Services, therefore, cannot issue an ESA incidental take statement for that activity. And without an incidental take statement covering impacts from the activity at issue, the federal action agency that initiated Section 7 consultation cannot comply with the Endangered Species Act and, therefore, must reject the application to undertake to proposed activity.

This drastic outcome unfortunately is not uncommon. As just one example, this problem frequently arises in the Southeast U.S. within the range of the West Indian manatee. The manatee is a beloved marine mammal that USFWS has listed as a threatened species under the ESA but has not promulgated a regulation removing the species from the MMPA's moratorium on marine mammal take. As a result, any proposed activity that could incidentally take even a single manatee cannot be approved under the MMPA and, therefore, cannot receive an incidental take statement under the ESA. This has resulted in scores of proposed activities and projects throughout the Southeast – including marinas, boat ramps, docks, and industrial and commercial developments – being denied federal permits and approvals simply because the threatened species that would be impacted happens to be a manatee, rather than some other threatened or endangered species.

It is hard to imagine that this is what Congress intended with Section 7(b)(4)(C) of the ESA. When Congress required activities undergoing Section 7 consultation to secure an MMPA authorization before receiving an ESA incidental take statement, it could not have anticipated that MMPA authorizations would never be available for particular species of marine mammals. But that is exactly what has happened, and it has resulted in an arbitrary application of the law. As things currently stand, the Services freely authorize incidental take of threatened and endangered non-marine mammal species from an activity, but cannot authorize incidental take of certain threatened and endangered marine mammal species that would face identical impacts from that activity. While all threatened and endangered species should receive the full protections that Congress intended for them under the ESA, continued differential treatment of listed marine mammal species serves little conservation or recovery purpose. Congress, therefore, should amend the MMPA and the ESA to harmonize the two statutes.

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In conclusion, while the ESA and the MMPA serve important national goals, the federal implementing agencies are interpreting and implementing both statutes in ways that Congress never intended. The result has been sweeping regulatory restrictions on private activities across broad swaths of the country's lands and oceans and arbitrary denials of federal permits. Because these problems arise from the provisions of the ESA and MMPA, only a legislative change can fix them. This could be accomplished with two straightforward steps:

1. Amend Section 112(a) of the MMPA (16 U.S.C. § 1382(a)) and Section 11(f) of the ESA (16 U.S.C. 1540(f)) to clarify that the authority to promulgate regulations that are "necessary" and/or "appropriate" under each statute does not include authority to

promulgate prophylactic regulations designed to reduce the mere potential for private activities to impact species; and

2. Amend Section 101(a) of the MMPA (16 U.S.C. § 1371(a)) to include an exception to the moratorium on taking a marine mammal to the extent that taking is covered by an incidental take statement to a biological opinion issued under Section 7(b)(4) of the ESA (16 U.S.C. § 1536(b)(4)), and make a conforming amendment to the ESA by striking Section 7(b)(4)(C) (16 U.S.C. § 1536(b)(4)(C)).

Making these simple changes would realign federal agency implementation of the ESA and MMPA with the legislative frameworks that Congress designed, foster better governmental decision-making, and promote continued conservation and recovery of at-risk species.

Thank you for considering this testimony.