Forrest Burkholder

On Behalf of the EnerGeo Alliance

Written Testimony on

Discussion Draft of H.R. ____ (Rep. Begich), To amend the Marine Mammal Protection Act of 1972

Before the

U.S. House of Representatives Natural Resources Committee

Subcommittee on Water, Wildlife, and Fisheries

Legislative Hearing

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The Honorable Harriet Hageman, Chair, The Honorable Val Hoyle, Ranking Member, and Members of the Subcommittee:

For the record, my name is Forrest Burkholder, and I present this testimony on behalf of the EnerGeo Alliance ("EnerGeo"). I am the President and CEO of SAExploration ("SAE"), which is global geophysical services company headquartered in Houston, Texas and with offices around the world. SAE offers a full range of vertically-integrated seismic data acquisition and support services and products, including the acquisition of 2D, 3D, time-lapse 4D and multi-component seismic data on land, in transition zones and offshore in depths reaching 3,000 meters, SAE also provides logistical support services, such as program design, planning and permitting, camp services and infrastructure, surveying, drilling, environmental assessment and reclamation, and community relations. SAE is a member of EnerGeo, and I serve as Vice Chair of EnerGeo's Board of Directors. EnerGeo's membership base includes 60 companies spanning 50 countries. EnerGeo's mission is to advance the energy geoscience and exploration industry through global governmental, regulatory, and legal advocacy, communications, environmental and scientific research, and standard development.

I first walked on to a seismic job as an unskilled young man. Over the next nearly 40 years, I would do almost every job that can be done in the seismic industry. Today I have the privilege of working with approximately 1,000 hard-working men and women all over the world as CEO and President. Together we take on some of the most complex, challenging, and cutting-edge seismic projects ever, always prioritizing safety, innovation, and customer results. SAExploration is proven in adapting to complex environments and leading high-performance teams across the globe. Of particular relevance to this matter are the nearly 10 years of field operations across remote regions on the North Slope of Alaska and another nearly 15 years in management roles. I have seen up close every aspect of Alaskan community engagement, Arctic logistics, permitting, and environmental compliance, and am proud to have earned a close personal familiarity with Alaska's people, environment, regulatory landscape, and operational challenges.

Founded in 1971, EnerGeo is the non-profit global trade alliance for the energy geoscience and exploration industry. EnerGeo member companies include onshore and offshore geoscience survey operators and acquisition companies, energy data and processing providers, energy exploration and development companies, equipment and software manufacturers, industry suppliers, service providers, and consultancies. EnerGeo advocates for connecting more people and communities with access to energy around the world—by communicating factually, securing science-based policies, and promoting the geoscience companies, innovators and energy developers that use earth science to discover, develop and deliver energy, sustainably, to our world. Together, we are Making Energy Possible.

Many EnerGeo member companies operate in the U.S., both onshore and offshore across the Outer Continental Shelf ("OCS"), and extensively within the Gulf of America (the "Gulf"). These companies play an integral role in the successful exploration and development of offshore hydrocarbon, wind, and low-carbon solutions such as carbon capture and storage resources through the acquisition and processing of geophysical and geological data. Through reliable science- and data-based regulatory advocacy, credible resources and expertise, and future-focused leadership, EnerGeo continuously works to develop and promote informed government policies that advance responsible energy exploration, production, and operations. As the U.S. and global energy demand evolves, we believe that all policymakers and energy companies pursuing mainstay, alternative, and low-carbon solutions should have access to reliable data and analysis to support their forward-moving efforts.

For years, EnerGeo has worked to provide a self-sustaining structure for the continued successful implementation of, and compliance with, both present and future Marine Mammal Protection Act ("MMPA") incidental take authorizations applicable to geoscience surveys and to provide comprehensive marine mammal monitoring data. EnerGeo has extensive experience with the process of obtaining and implementing incidental take regulations ("ITRs") under the MMPA through its work assisting and advocating for its members who are regulated under the ITRs currently in place for geophysical activities in the Gulf. EnerGeo has also prepared and submitted a petition for the issuance of new five-year ITRs for Gulf geophysical activities.

I appreciate this opportunity to testify before the Subcommittee about the significant need and support for modernizing the MMPA. In the early 1970s, the congressional intent behind the MMPA was innovative and forward-thinking. Decades of regulation and litigation, however, have caused the MMPA to be interpreted far more expansively than Congress intended and exposed significant flaws and shortcomings in the plain language of the Act.

The primary flaws in the MMPA stem from (i) poorly written statutory language that creates significant ambiguity and uncertainty in the application of the MMPA's legal standards, and (ii) a lack of clear procedural directives and deadlines. These flaws result in agency delay, overly conservative and inaccurate impact analyses, misapplication of the statute by overzealous agency officials, confusion by agencies and courts, and exploitation by environmental activists who use litigation as a tool to attempt to impede or prevent activities they do not support. Fixing some of the obvious flaws in the MMPA could result in tangible improvements that increase efficiency, decrease uncertainty and risk, and ultimately benefit all stakeholders and the implementing agencies.

Below, I first describe the outsized and congressionally *unintended* role the MMPA has gained in the federal government's authorization and regulation of essential activities. I then discuss the current statutory framework for authorizing incidental take of marine mammals under the MMPA, along with several examples showing how the MMPA's incidental take authorization process has become unworkable over years of agency misapplication of, and litigation over, ambiguous statutory terms. Finally, I explain EnerGeo's strong support for the Draft Discussion Bill and highlight specific proposed changes that would fundamentally improve the administration and implementation of the MMPA.

A. The MMPA's Role in Development of U.S. Natural Resources.

The management of natural resources in the U.S., such as energy and fish, is governed by substantive statutes that establish the policies and standards for the development of those resources. For example, in the Outer Continental Shelf Lands Act ("OCSLA"), Congress expressly mandated the "expeditious and orderly development" of the OCS "subject to environmental safeguards." 43 U.S.C. § 1332(3). 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).

Likewise, the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson Act") establishes a "national program for the conservation and management of the fishery resources of the United States . . . to realize the full potential of the Nation's fishery resources." 16 U.S.C. § 1801(a)(6). When enacting the Magnuson Act, Congress declared that a key purpose of the act was "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States . . . by exercising . . . sovereign rights for the purposes of exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone . . . ." *Id*. § 1801(b)(1).

These statutes—and others like them—authorize and regulate activities on the OCS and the resource-rich coastal areas of the U.S. (such as Alaska's North Slope) that Congress has deemed essential to the country and its citizens. Those activities are permitted and managed by agencies such as the Bureau of Ocean Energy Management, the Bureau of Land Management, and the Sustainable Fisheries Division of the National Marine Fisheries Service ("NMFS").[1] In this context, it is important to recognize that NMFS's Protected Resources Division ("PRD") and the U.S. Fish and Wildlife Service ("FWS")[2] have no statutory authority over resource development activities, which, again, are authorized and managed by other agencies or agency divisions. In the context of the MMPA, the authority of NMFS PRD and FWS extends *only* to the authorization of incidental take of marine mammals. *See Ctr. for Biological Diversity v.*

[1] NMFS's Sustainable Fisheries Division is distinct from NMFS's Protected Resources Division. The former is statutorily responsible for managing fisheries and the latter manages federally protected species, such as marine mammals under the MMPA.

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

Salazar, 695 F.3d 893, 916 (9th Cir. 2012) ("[I]ncidental take regulations do not authorize, or permit, the actual activities associated with oil and gas exploration in the Chukchi Sea; they simply shield the proposed activities from take liability under the MMPA." (internal quotation marks and citation omitted)).

Notwithstanding the narrow role of NMFS PRD and FWS, MMPA incidental take authorizations are often the primary cause of delay and other impediments to otherwise lawful activities that are authorized and managed under other statutes. This is primarily the result of a lack of incentive for NMFS PRD and FWS to promptly issue incidental take authorizations, the agencies' overzealous use of MMPA authority to apply "precautionary" assumptions about impacts in a manner that curbs or improperly restricts activities, and litigation by environmental activists to exploit ambiguous statutory terms. These problems have created an untenable and statutorily unsupported situation in which NMFS PRD and FWS act as *de facto* regulators of activities that Congress intended to be encouraged, authorized, and regulated by other agencies under other statutes.

B. Incidental Take Authorization Under the MMPA.

The MMPA establishes a prohibition on the "taking" of marine mammals in U.S. waters, unless the taking is authorized by NMFS PRD 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* 16 U.S.C. § 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, 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]; 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)(i), (ii).

For many years, NMFS PRD and FWS have authorized the incidental taking of marine mammals for activities such as energy exploration and development. The vast majority of MMPA incidental take authorizations associated with those activities has involved short-term, temporary behavioral harassment (Level B). These authorizations have been made through either (i) the issuance of ITRs under MMPA Section 101(a)(5)(A) (and subsequent "letters of authorization" or "LOAs"), which are effective for a period of up to five years, or (ii) the issuance of "incidental harassment authorizations" ("IHAs") under MMPA Section 101(a)(5)(D), which are effective for a period of up to one year.

Because the issuance of an incidental take authorization under the MMPA is a "federal action," it triggers consultation under Section 7 of the Endangered Species Act ("ESA") and review under the National Environmental Policy Act ("NEPA"). Although ESA compliance is required under current law for MMPA authorizations, that compliance provides no additional

substantive protection for marine mammals because the standards for incidental take authorization under the MMPA are as stringent as or more stringent than the standard applicable to a finding of "no jeopardy" under Section 7 of the ESA.

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. 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).

Unfortunately, IHAs issued for commercial and industrial activities rarely, if ever, satisfy the timing requirements of the MMPA. NMFS PRD itself states on its website that the IHA permitting process takes at least five to eight months to complete (far in excess of the statutory deadlines),[3] and the process often takes much longer. The MMPA provides no consequences for such delay, nor does it provide any incentives to NMFS PRD and FWS to avoid delay. Because the MMPA contains no timing requirements applicable to ITRs, the regulatory process for the issuance of ITRs for commercial and industrial activities takes years to complete. Arctic ITRs are typically issued one-and-a-half to three years after an ITR petition has been submitted. And the only ITR that has been issued for geophysical activities in the Gulf took approximately 20 years to materialize from the time when the first petition was submitted.

A significant source of delay in the issuance of MMPA incidental take authorizations is the agencies' method for estimating the number of incidental takes that are expected to occur. Because the MMPA's definition of "harassment" is extraordinarily ambiguous, FWS and NMFS PRD struggle to determine what activities actually cause take and they apply extremely conservative assumptions and overly complicated modeling to ensure that their take estimation modeling encapsulates all conceivable take (and more). This results in take estimates that are inaccurate and exaggerate the number of incidental takes that will actually occur. Unfortunately, these take-modeling exercises play an unduly important role in the permitting process because the agencies are required to demonstrate that the authorized incidental take will have a "negligible impact" on affected marine mammal stocks and involve "small numbers" of marine mammals. Inaccurate and exaggerated take estimates are problematic (not to mention unlawful) because they cause agencies to make "negligible impact" and "small numbers" determinations based on false estimates and incorrect impact assessments rather than on an *objective* application of the best *available* scientific information.

[3] *See* NOAA Fisheries, Incidental Take Authorizations Under the Marine Mammal Protection Act (July 3, 2025), https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.

All of these problems and inefficiencies create fertile ground for legal challenges by environmental activist groups that will readily file lawsuits for the sole purpose of impeding and preventing activities to which they are opposed. This ever-present litigation threat causes agencies to err on the side of overestimating impacts, which ultimately just creates more vulnerabilities and significantly delays the process.

C. Misuse and Misapplication of the MMPA Has Resulted in Unwarranted Delay, Wasted Resources, and Needless Litigation.

Application of the incidental take authorization provisions of the MMPA have delayed and impeded otherwise lawful activities, wasted countless taxpayer dollars, and given rise to excessive litigation by environmental activists using the MMPA as a tool to prevent and frustrate lawful activities, such as oil and gas exploration and development. The following non-exclusive list of examples illustrates the breadth and magnitude these problems.[4]

- In 2018, SAExploration submitted a petition for a two-year ITR under MMPA Section 101(a)(5)(A) related to a planned pre-lease seismic survey on the Coastal Plain of the Arctic National Wildlife Refuge. FWS delayed and ultimately stymied issuance of the requested ITR based on its insistence on using an unproven and unsupported model that egregiously overestimated the likelihood of impacts to polar bears. Subsequently, in 2020, the company requested an IHA under MMPA Section 101(a)(5)(D) for its re-planned Coastal Plain seismic survey. FWS stopped work on the IHA without a legal or factual basis and the survey has not occurred to this day.

- In 2002, the Bureau of Ocean Energy Management (then Minerals Management Service) submitted a petition to NMFS for an ITR applicable to the Gulf of America (then Gulf of Mexico) geophysical exploration activities. After multiple agency-caused and litigation-caused delays, NMFS PRD issued the requested ITR in 2021 (19 years later). The agency's subsequent mal-administration of the ITR resulted in significant delays of seismic surveys and the ITR was so flawed that NMFS PRD had to amend it in 2024.

- In 2015, FWS issued a LOA under an ITR to a company related to planned exploration drilling in the Chukchi Sea off the coast of Alaska. FWS included an unsupported and unreasonable condition in the LOA that prevented the drilling program from being carried out as planned.

- In 2014 and 2015, multiple exploration companies applied for IHAs related to planned seismic surveys off the Atlantic coast in areas that had not been surveyed since the 1980s. NMFS PRD flagrantly delayed the IHAs, which were not issued until 2018. This delay contributed to the ultimate shelving of the planned surveys.

[4] These examples do not include, for instance, multiple lawsuits involving the U.S. Navy in which environmental activists have asserted MMPA-based claims to impede essential military defense preparation activities.

- In 2022, SAExploration submitted a request to FWS for an ITR related to planned seismic surveys on Alaska's North Slope. FWS has repeatedly delayed the processing of this request and still has not issued a decision.

- In 2021, a court found fault with an ITR for oil and gas activities in Cook Inlet on the sole basis that NMFS failed to evaluate the alleged effects of sound produced by tugboats. This led to the court's partial vacatur of the ITR as well as the payment of public tax dollars from NMFS to the environmental activist plaintiffs to reimburse them for their attorney fees.

- In 2006, a company seeking to perform a seismic survey off the coast of Alaska was forced to obtain an emergency court order staying the applicability of unlawful conditions that NMFS PRD arbitrarily included in an IHA that would otherwise have prevented the survey from occurring as planned.

- Since 1993, FWS has issued multiple five-year ITRs applicable to oil and gas activities on Alaska's North Slope. These ITRs have been repeatedly challenged in court by environmental activists, resulting in four different lawsuits in the Alaska district court and four appeals to the Ninth Circuit. These efforts to use the MMPA as a tool to impede oil and gas activities have been almost entirely rejected by the courts but have nevertheless caused needless, significant expenditures of time, resources, and public tax dollars, as well as delays.

D. EnerGeo Supports the Draft Discussion Bill.

In general, EnerGeo believes that the Draft Discussion Bill presents necessary, thoughtful, and reasonable changes to the MMPA that will make implementation of the statute more efficient and predictable, without reducing protections for marine mammals. Below, I highlight some examples from the Draft Discussion Bill that are particularly important and, if enacted, would mark significant improvements to the MMPA.

Section 2 provides an important clarification that decisions under the MMPA must be based on the *objective application* of the best available scientific and commercial data. Over time, NMFS PRD's and FWS's unlawful and baseless importation of the "precautionary principle" into MMPA decision-making has thwarted congressional intent and resulted in biased agency decisions. As the D.C. Circuit Court of Appeals pointedly explained in the context of the ESA:

> [W]hen the Congress wants an agency to apply a precautionary principle, it says so. . . . The precautionary principle, taken seriously, can multiply an agency's power over the economy. It allows an agency to regulate or veto activities even if it cannot be shown that those activities are likely to produce significant harms. . . . When the Service applies a substantive presumption to distort the analysis, the public can have no confidence that economic

> dislocation is needed to protect a species and is not the result of speculation or surmise by overly zealous agency officials.

Maine Lobstermen's Ass'n v. Nat'l Marine Fisheries Serv., 70 F.4th 582, 599-600 (D.C. Cir. 2023) (*MLA v. NMFS*) (internal quotation marks and citation omitted). The ESA problems addressed in *MLA v. NMFS* apply equally to the agency's administration of the MMPA. Because NMFS PRD and FWS continue to unlawfully apply a "precautionary principle" that appears nowhere in the text of the MMPA, Congress should respond by including an express statement in the Act reminding those agencies that they must *objectively* apply the best scientific information available and shall not apply a precautionary principle at any stage of the MMPA decision-making process.

Section 3 presents many necessary updates to the definitional provisions of the MMPA. Among those is a minor—but very important—revision to the MMPA's definition of "harassment," which, as currently defined, is overly broad and ambiguous because it confusingly refers to "potential" harassment rather than *actual* harassment. This results in serious problems in the estimation of incidental take, unrealistic assumptions by the implementing agencies, and inaccurate and exaggerated take findings. By removing the word "potential"—which is not included in the definitions for the other mechanisms of "take" in the MMPA, ESA, or any other wildlife statutes—the Draft Discussion Bill would provide more clarity for agencies and the regulated community, and would also more closely align the respective meanings of "harassment" under the MMPA and ESA.

Section 4 presents numerous updates that are necessary to make the broken ITR and IHA processes workable again. Below, I highlight five key changes proposed in Section 4.

First, history has shown that a five-year period of effectiveness for ITRs is counterproductive, creates an inefficient permitting process, and leads to repetitive lawsuits by advocacy organizations seeking to impede or halt activities. Section 4 resolves these issues by eliminating the five-year expiration date and allowing an applicant to define the time period for the requested regulations.

Second, the MMPA, as currently written, requires incidental take authorizations to both have no more than a "negligible impact" on the species concerned and involve "small numbers" of marine mammals. There is significant overlap between these two ambiguous standards, and the "small numbers" requirement, in particular, has no scientific basis. This has led to regulatory uncertainty, inconsistent application by agencies, delay, and litigation. Indeed, there have been over 15 court opinions attempting to interpret, apply, or resolve the "small numbers" requirement alone. Just as ESA Section 7 contains a single standard for effects on species (*i.e.*, "not likely to jeopardize"), the MMPA should have a single standard for incidental take authorizations—"negligible impact." Section 4's elimination of the "small numbers" requirement will significantly improve the agencies' administration of the MMPA and eliminate a hopelessly ambiguous term that has been exploited by litigants.

Third, to issue an incidental take authorization under Section 101(a)(5) of the MMPA, as currently written, the agency must require "other means of effecting the least practicable

impact." These "other means" typically take the form of mitigation and monitoring measures included as conditions of the authorization. The problem is that the phrase "other means of effecting the least practicable impact" is not defined in the statute and is extremely ambiguous. As a result, this requirement is not consistently applied by agencies and has been unreasonably interpreted by the Ninth Circuit Court of Appeals. *See Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1134-41 (9th Cir. 2016). Section 4 provides much needed clarity by stating that the agency may impose "practicable and economically feasible conditions . . . to minimize the impact of such taking on such species or stock and the habitat of such species or stock . . . ." Additionally, by specifying that those conditions "shall not alter the basic design, location, scope, duration or timing of the specified activity," Section 4 would align the MMPA standard with the ESA's regulatory standard for the imposition of "reasonable and prudent measures" in incidental take statements. *See* 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(2).

Fourth, the processes for obtaining ITRs or IHAs are, as a matter of agency practice, time-consuming and riddled with delay. The very few procedural requirements in the current version of the MMPA create little accountability for agencies because they are either ambiguous or establish no consequences or solutions for unreasonably delayed agency action. Section 4 would revise and update the MMPA's procedural requirements to set clear and firm deadlines for each stage of the ITR and IHA issuance processes, and would establish consequences for when agency deadlines are not met. These provisions are essential to make Sections 101(a)(5)(A) and 101(a)(5)(D) workable again, and would retain all existing opportunities for public involvement in the ITR and IHA processes.

Fifth, Section 4 would create significant efficiencies that help to streamline the MMPA incidental take authorization process by eliminating duplicative analyses under ESA Section 7 and NEPA. Neither of those statutes contains more rigorous standards than the MMPA. Moreover, agencies routinely repackage the same or similar analyses prepared in support of their MMPA authorizations for ESA and NEPA compliance. This is extremely inefficient and there is no rational reason why agencies should be required to prepare three separate—but substantively similar—regulatory documents for a single, simple MMPA incidental take authorization. The extra processes provide no additional protections for marine mammals and, instead, triple the number of potential claims that environmental activists may allege in lawsuits challenging the incidental take authorizations. Eliminating this duplication will markedly improve the administration of the MMPA.

E. Conclusion

Although well-intended at the time it was enacted many years ago, the MMPA's ambiguous and outdated language has proven unworkable in many respects. Above, I have highlighted many of the problems associated with issuance of ITRs and IHAs under Section 101(a)(5). Those problems are encountered by numerous ocean users, such as the geoscience, oil and gas, renewable energy, and shipping industries. I understand that commercial fisheries have encountered similar problems, which the Draft Discussion Bill would also help to address. Changes to the statute, such as those described above, will significantly improve the regulatory process for both federal regulators and the regulated community. EnerGeo strongly supports modernization of the MMPA, as reflected in the Draft Discussion Bill.