

Military readiness and marine mammal protection (sec. 319)

The House bill contained a provision (sec. 318) that would amend sections 3(18) and 101 of the Marine Mammal Protection Act (MMPA or the Act) (16 U.S.C. 1362(18) and 1371) to focus the 'harassment' definition on biologically significant impacts, eliminate the requirement to publish notice with respect to incidental takes, and remove references to 'small numbers,' 'specified geographical region,' and 'specific geographic region,' as pertains to incidental take permits. The provision would also include an exemption for activities necessary for the national defense.

The Senate amendment contained no similar provision.

The Senate recedes with an amendment that would apply the new 'harassment' definition to military readiness activities and scientific research activities by or on behalf of the Federal Government. The conference agreement would also include the following: changes to the permit process; the national defense exemption; considerations relevant to mitigation and monitoring requirements; and other technical changes.

Specifically, the conference agreement would amend section 3(18) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362(18)) by providing a new definition of 'harassment' applicable only to military readiness activities, as defined by section 315(f) of the National Defense Authorization Act for Fiscal Year 2003 (Public Law 107-314), and scientific research activities by or on behalf of the Federal Government, conducted pursuant to section 104(c)(3) of the Act (16 U.S.C. 1374(c)(3)). The new definition will provide greater clarity for the Department of Defense (DOD) and the regulatory agencies, and would properly focus authorization of military readiness and scientific research activities on biologically significant impacts to marine mammals, a science-based approach. Under the new definition for 'Level B Harassment,' behavioral patterns would be considered 'abandoned' if long-term cessation of behaviors and demographic consequences to reproduction or survivability of the species or stock were involved. In order for natural behavioral patterns to be considered 'significantly altered,' there must be demographic consequences to reproduction or survivability of the species.

In addition, the conference agreement would authorize the Secretary of Defense, after conferring with the Secretary of Commerce, the Secretary of the Interior, or both, to exempt from the MMPA any action by the DOD or its components for up to two years, with renewable periods of exemption, if determined necessary for national defense. This authority is consistent with similar exemptions included in other environmental statutes.

The conference agreement would also cure deficiencies related to the incidental take permit process under MMPA, as applied to military readiness and scientific research activities. The need to address these deficiencies was recently highlighted by the ruling in *Natural Resources Defense Council, Inc. et al. v. Evans*, No. C-02-3805-EDL, 232 F. Supp. 2d 1003 (N.D. Cal 2002), a case that was initiated to stop deployment of the Navy's Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) sonar system. For example, given the migratory nature of marine mammals and the

varying biological and bathymetric features of the geographic regions occupied by migratory marine mammals, it is very difficult to describe 'specified geographical region' for military readiness activities that take place over large areas of the ocean. The case also reveals the conundrum associated with reconciling the meaning of 'small number' in relation to 'negligible impact.' As a result of this recent ruling and other litigation related to the Act, the conferees agreed to eliminate the requirements for 'specific geographic region,' and 'specified geographical region' and 'small numbers,' terms that have proven more valuable as a basis for litigation than affording legitimate or demonstrable protection to marine mammals. Such changes would ensure a credible and flexible regulatory process that properly balances the equities associated with military readiness and maritime species protection. It is expected that the rulemaking process would continue to use best available scientific information to analyze impacts on marine mammals.

The conferees intend that the changes in the definition of 'harassment,' as well as changes in the incidental take permit process, would not eliminate the existing requirements for mitigation and monitoring (16 U.S.C. 1371(a)(5)). Instead, the use of mitigation and monitoring measures would be focused on the biologically significant impacts on marine mammals. In addition, decisions regarding mitigation and monitoring would take into account safety, practicality of implementation, and impact on the effectiveness of a military readiness activity.

Finally, the conferees commend the DOD and Navy for their commitment and leadership on marine mammal research. This research, currently funded at about \$7.0 million per year, has provided valuable information on the impact of anthropogenic sounds upon marine mammals, marine mammal densities, and the health and vitality of marine mammal species. At a minimum, it is expected that DOD and Navy would continue these efforts and would maintain level funding in the Future Years Defense Plan. The conferees direct the Secretary of Defense to provide an annual report to the congressional defense committees on the funding provided and research conducted in relation to marine mammals. The report may be provided pursuant to section 2706(b) of title 10, United States Code.