

**Written Testimony of
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***Hybrid Legislative Hearing on H.R. 3431; H.R. 6491; H.R. 6651;
H.R.6785; and Revised Amendment of H.R. 6987***

**To the
United States House of Representatives
Committee on Natural Resources
Subcommittee on Water, Oceans, and Wildlife**

March 17, 2022

Chairman Huffman, Ranking Member Bentz and distinguished Members of the Subcommittee, I appreciate the opportunity to speak with you today about several bills related to marine resource issues currently before the Subcommittee.

I am Rick E. Marks, a Principal at Robertson, Monagle & Eastaugh, P.C. (“ROMEA”) of Vienna, VA. My comments today are my own based on a near 30-year career of science and advocacy, including serving the U.S. commercial fishing/seafood industry and numerous coastal and tribal communities in Alaska, Washington, Oregon, California, Florida (Gulf Coast, East Coast, and the entire FL Keys), New Jersey and Rhode Island. My testimony is informed by Client perspectives and by my extensive history of science and advocacy but I am not here today at the request of any Client.

My background also includes service on the Mid-Atlantic Fishery Management Council; service on four Marine Mammal Protection Act-mandated Take Reduction Teams (TRTs), including for large whales; employment as a supervisory marine fisheries biologist for the State of North Carolina; and as a Fishery Reporting Specialist and Benthic Marine Field Technician for NOAA. I hold a Master of Science Degree in Marine Environmental Science (with emphasis in coastal fish ecology), and a Bachelor of Science Degree in Biology. I have authored several scientific papers in peer-reviewed journals regarding various aspects of marine finfish foraging ecology and biology. I earned a professional certification in Environmental Conflict Resolution (ECR) from the Morris K. Udall Foundation in Arizona.

My detailed comments on specific legislation are provided below.

H.R. 6651: (Rep. Don Young, R-AK); *Alaska Salmon Research Task Force Act*

I support Congressman’s Young’s efforts to provide a coordinated research salmon strategy and to support increased collaborative efforts for Pacific salmon conservation.

H.R. 6651 creates a task force that brings together NOAA, the North Pacific Fishery Management Council (NPFMC), the U.S. component of the Pacific Salmon Commission, Alaska Natives, the Alaska commercial fishing industry, recreational and charter fishing stakeholders, seafood processors, hatchery interests, members of academia, and the State of Alaska. The condition of Pacific salmon stocks involves all these entities and providing a framework for discussion and exchange of information can be beneficial.

I recognize there are some legitimate concerns that H.R. 6651 will not produce aggressive results quickly enough to restore salmon stocks to levels permitting adequate harvest levels for all stakeholder groups. This is totally understandable, especially for those dependent on ceremonial and subsistence uses. Unfortunately, the problems are extremely complicated and not easy to fix quickly.

There is no question Pacific salmon stocks are in need of the increased attention specified in H.R. 6651. According to NOAA, across the North Pacific region the number of spawning adult salmon is reducing in number and becoming less predictable. Changing ocean conditions appears to be the primary factor but the situation is extremely complicated for these species that migrate across the North Pacific and return to freshwater environments to spawn. Recent data from NOAA also suggests adult salmon are experiencing higher mortality compared to the usually higher rates experienced early in the marine phase of their life history. ⁽¹⁾

In addition to the Task Force created by H.R. 6651 there is encouraging news on Pacific salmon science. On January 30, 2022 NOAA launched a 40-day comprehensive oceanographic survey of the Gulf of Alaska to examine all five species of Pacific salmon during the period they spend in the ocean. The comprehensive data collection program, including foraging behavior, predators and competitors, genetics, and both physical and biological oceanographic elements, should help fishery managers predict returns more accurately and allow for a better understanding of human impacts versus natural stock variation. ⁽¹⁾

Recommendation: Support passage of H.R. 6651.

H.R. 6785: (Rep. Seth Moulton, D-MA); *Right Whale Coexistence Act of 2022*

I offer two points on H.R. 6785. First, the bill creates a grant program to support projects designed to reduce lethal and sub-lethal effect of human activities on North Atlantic Right Whales. This provision would increase collaboration and provides for an inclusive list of eligible applicants. There is also a helpful waiver option of the local cost share provided the project is of a high priority.

Secondly, Section 201 of the bill authorizes a NOAA Continuous Plankton Recorder Survey (CPRS) at \$300,000 per year. There are a few issues with this provision. My research indicates NOAA already manages a long time series CPRS in the Gulf of Maine, running from 1961 to 2017, and which resumed in 2020. There are also ongoing regional efforts including in Massachusetts Bay which augment the larger CPRS. According to

NOAA, plankton sampling will also be added to two CPRS routes in the Northwest Atlantic, running across the Scotian Shelf off Nova Scotia south to Cape May, NJ; and a second transect running across the North Atlantic from Iceland to Newfoundland. ⁽²⁾ Thus, it seems the Agency currently provides adequate funding and contracting for CPRS activities making Section 201 redundant and unnecessary.

However, in my opinion H.R.6785 misses the mark on what other plankton survey(s) may be equally critical to the CPRS and our understanding of the health of the right whale population. Current CPRS programs collect data on plankton location, distribution and density but not on the lipid protein content of the forage base. This is a critical missing element in the overall health assessment of the North Atlantic right whale population.

Since about 2010, and during my ongoing tenure on NOAA's Atlantic Large Whale Take Reduction Team (ALWTRT), we learned individual right whales were showing signs of a trend in lower body mass index, potentially leading to reduced overall fitness and increased length of female calving intervals. It was also reported to our TRT by NOAA scientists that whales were moving into different foraging areas, moving from MASS Bay and the Bay of Fundy, ME up into the Gulf of St. Lawrence in search of adequate forage costing more in terms of expanded energy. There was also increasing evidence the available plankton was of a lower caloric value due to the impacts of changing ocean conditions on the marine food web.

It is my understanding that NOAA's ecosystem monitoring programs includes plankton survey components that actually do collect samples that can be analyzed for caloric content. It is unclear if this survey(s), and not the long-running CPRS authorized by H.R. 6785, are sufficiently robust and adequately funded for the long term. If these other survey components are not implemented the process will not include critical data inputs that would aid overall right whale conservation efforts.

Recommendations: The grant program component of H.R. 6785 may provide the opportunity for projects to better understand impacts to North Atlantic right whales. The survey component is redundant and unnecessary and neglects to address other key NOAA plankton survey programs. H.R. 6785 should be reworked to more effectively mesh NOAA plankton surveys with the dynamic foraging behavior of right whales.

H.R. 6491: (Rep. Jared Huffman, D-CA); *Salmon Focused Investments in Sustainable Habitats (FISH) Act*

The bill defines and requires the identification of salmon conservation areas and salmon strongholds in the Western U.S. NOAA and the USFWS are required to publish guidance on process and biological criteria and publish a list of conservation/stronghold areas within one year after date of enactment.

The definitions in Section 3 appear satisfactory and the consultation requirements with affected States and Indian Tribes are constructive but as written the bill has some very problematic provisions and the area designation processes raise concerns.

In Section 3 the bill includes Atlantic salmon (*Salmo salar*). The need to include this species is somewhat bewildering. Is the intent to designate habitat areas around aquaculture operations? Some added clarification here as to intent would be helpful in our understanding of the legislation.

In Section 4 the bill creates a public nomination process for salmon conservation and stronghold areas. This appears analogous to the 2014 nomination process created for expanding NOAA's National Marine Sanctuary system. In my extensive experience advocating for the regulated marine community we saw an immediate and concerning increase in the number of sanctuary nominations as a result of a similar type of programmatic expansion and we would expect the same in this case.

Section 4 of the bill requires NOAA use the essential fish habitat (EFH) provision at Section 305(b) of the Magnuson-Stevens Act (16 U.S.C. 1855(b)). However, this section of the MSA merely provides guidance to the Regional Fishery Management Councils (RFMCs) who then are required to act under Section 303(a)(7) to describe and identify EFH. Thus, it appears the Councils could have some role in designating salmon habitat but that role is not well defined nor are specific timelines given for the EFH process.

In addition, it appear this EFH provision could also potentially expand marine EFH and associated protections under the MSA inland, possibly all the way to the State of Idaho. This provision appears to expand NOAA's regulatory and consultation footprint on permitted activities far upland and the implications on what federal agencies can do in these expanded areas is uncertain. These issues must be clarified to fully understand the ramifications and identify any added burdens on the RFMC system.

Sections 4 and 6 expand the program beyond salmon areas and strongholds to include the management, restoration and protection of watersheds. Section 7 also raises concerns since it appears to allow the purchase of water rights and the transfer of purchased property to "other entities" within these newly designated areas.

The grant program in Section 7 also includes improving "resilience both downstream and upstream" possibly expanding third party efforts further into the marine environment beyond designated salmon areas and strongholds. It is unclear how this will mesh with existing statutory authorities.

All these provisions of the bill raise several questions as to the scope of this upland expansion and the balancing of Western salmon conservation and management with water use, food production and permitted activities, among other things.

Here are just a few of the unanswered questions that come to mind.

Q1: What are the implications for water rights and usage?

Q2: Could the federal government or third parties (e.g. NGOs?) use the federal funding to buy and hold water rights?

Q3: What are the types of “other entities” that could possibly be transferred publically purchased property? Could further restrictions on property use follow the transfer of ownership?

Q4: Could agricultural lands be at risk, thereby impacting our Nation’s food production and security?

Q5: How could the Secretary use a portion of the available funds to “preserve” watersheds?

Q6: How do these new measures mesh with existing habitat requirements under the MSA & ESA?

Q7: Will additional layers of ESA permit review be required in these areas?

Q8: Will NOAA have an expanded regulatory and consultative footprint upland, how will that manifest, and how far upland?

Recommendations: The focus on protecting West Coast salmon habitat is constructive but the bill raises many concerns. The public nomination process may well result in a flurry of nominations/designations, and the watershed expansion appears to have major implications for water use, food production and on permitted activities. The potential for the purchase, transfer or holding of property and water rights by the federal government or “other entities” is extremely worrisome. The scope of EFH expansion and the role of the RFMCs in the EFH designation process are unclear.

H.R. 6987: (Rep. Rick Larsen, D-WA): *An Amendment to the MMPA to Reduce Impacts of Vessel Traffic and Underwater Noise on Marine mammals, and for Other Purposes.* [Formally a component of H.R. 3764; and similar to H.R. 3692 and H.R. 5957; and as of March 9, 2022, offered as revised text in “Larsen_053” as an amendment to the MMPA as a component of the 2022 NDAA/USCG legislation]

Section 1 creates a grant program to monitor soundscapes by expanding observing systems for the purposes of collecting a baseline of underwater sound. This objective is scientifically sound but the Act also presupposes there is some level of harm occurring and that the program should also “protect and manage marine life”. This requirement is not appropriate for a data collection program.

Section 2 creates a grant program for seaports to reduce impacts of vessel traffic and port operations on marine mammals. Here again, the Amendment presupposes there is some level of harm that must be reduced and even requires development and implementation of

unspecified mitigation measures “that will lead to a quantifiable reduction in impacts to marine mammals” when no level of harm has been measured in the first place.

Section 3 creates a Near Real-Time Monitoring and Mitigation Program for Large Whales. The stated purpose of the program is to reduce the risk to large whales of vessel collisions *and minimizes other impacts to whales*; and specifies a pilot project for North Atlantic right whales. First of all, NOAA already has a comprehensive near-real time monitoring program in place for vessels operating near right whales and their habitat.

The existing NOAA program consists of an extensive network of speed reduction zones based on acoustic triggers and whale presence, pre-determined time and area SLOW zones with email notification to mariners, and Active Seasonal Management Areas (SMAs) with mandatory speed restrictions of 10 knots or less.

As an example for the Subcommittee, NOAA sent out the following right whale notification to mariners on March 11, 2022 at 1:17pm. ⁽³⁾

Subject: NEW VOLUNTARY RIGHT WHALE SPEED REDUCTION ZONE AND EXTENSION – March 9 and March 10, 2022

NOAA Fisheries announces two voluntary right whale SLOW Zones (acoustic triggers). On March 9, 2022, the New York Bight SE buoy operated by the Woods Hole Oceanographic Institution (WHOI) detected the presence of right whales 46 nm southeast of New York City, NY, and a SLOW Zone is in effect through March 24, 2022. Also, on March 10, 2022, the Cox Ledge Slocum glider operated by the WHOI and NOAA Northeast Fisheries Science Center redetected the presence of right whales 18 nm west of Martha's Vineyard, MA and a SLOW Zone is in effect through March 25, 2022. Mariners are requested to route around the areas or transit through these areas at 10 knots or less.

As a reminder, eight additional SLOW Zones are also currently in effect. Locations and effective dates of all zones are listed below.

VOLUNTARY Right whale "SLOW Zones" AREAS

Mariners are requested to avoid or transit at 10 knots or less inside the following areas where persistent aggregations of right whales have been sighted. Please visit www.nmfs.noaa.gov/pr/shipstrike for more information.

West of Martha's Vineyard, MA Acoustic SLOW Zone -- in effect through March 25, 2022

Waters bounded by:

NORTHERN BOUNDARY: 41 38 N
SOUTHERN BOUNDARY: 40 58 N
EASTERN BOUNDARY: 070 32 W
WESTERN BOUNDARY: 071 26 W

Southeast of New York City, NY Acoustic SLOW ZONE -- in effect through March 24, 2022

Waters bounded by:

NORTHERN BOUNDARY: 40 35 N
SOUTHERN BOUNDARY: 39 56 N
EASTERN BOUNDARY: 072 47 W
WESTERN BOUNDARY: 073 40 W

East of Boston #2, MA DMA SLOW Zone -- in effect through March 22, 2022

Waters bounded by:

NORTHERN BOUNDARY: 42 37 N
SOUTHERN BOUNDARY: 41 58 N

EASTERN BOUNDARY: 070 08 W
WESTERN BOUNDARY: 071 02 W

East of Boston, MA Acoustic SLOW Zone -- in effect through March 20, 2022

Waters bounded by:

NORTHERN BOUNDARY: 42 46 N
SOUTHERN BOUNDARY: 42 06 N
EASTERN BOUNDARY: 070 11 W
WESTERN BOUNDARY: 071 05 W

Southeast of Atlantic City, NJ Acoustic SLOW Zone -- in effect through March 20, 2022

Waters bounded by:

NORTHERN BOUNDARY: 39 25 N
SOUTHERN BOUNDARY: 38 44 N
EASTERN BOUNDARY: 073 44 W
WESTERN BOUNDARY: 074 36 W

South of Martha's Vineyard #2, MA DMA SLOW Zone -- in effect through March 19, 2022

Waters bounded by:

NORTHERN BOUNDARY: 41 25 N
SOUTHERN BOUNDARY: 40 41 N
EASTERN BOUNDARY: 070 10 W
WESTERN BOUNDARY: 071 10 W

South of Martha's Vineyard, MA Acoustic SLOW Zone -- in effect through March 18, 2022

Waters bounded by:

NORTHERN BOUNDARY: 41 19 N
SOUTHERN BOUNDARY: 40 39 N
EASTERN BOUNDARY: 070 05 W
WESTERN BOUNDARY: 070 58 W

South of Nantucket, MA DMA SLOW Zone -- in effect through March 16, 2022

Waters bounded by:

NORTHERN BOUNDARY: 41 17 N
SOUTHERN BOUNDARY: 40 36 N
EASTERN BOUNDARY: 069 35 W
WESTERN BOUNDARY: 070 29 W

Southeast of Atlantic City, NJ #2 Acoustic SLOW Zone -- in effect through March 16, 2022

Waters bounded by:

NORTHERN BOUNDARY: 39 00 N
SOUTHERN BOUNDARY: 38 20 N
EASTERN BOUNDARY: 073 31 W
WESTERN BOUNDARY: 074 22 W

East of Ocean City, MD Acoustic SLOW ZONE -- in effect through March 11, 2022

Waters bounded by:

NORTHERN BOUNDARY: 38 38 N
SOUTHERN BOUNDARY: 37 58 N
EASTERN BOUNDARY: 074 13 W
WESTERN BOUNDARY: 075 04 W

ACTIVE SEASONAL MANAGEMENT AREAS (SMAs)

Mandatory speed restrictions of 10 knots or less (50 CFR 224.105) are in effect in the following areas:

Off Race Point SMA
Cape Cod Bay SMA

Mid-Atlantic U.S. SMAs
Southeast U.S.SMAs

SPREAD THE WORD:

All boaters from Maine to Virginia, or interested parties, can sign up for [email or text notifications](#) about the latest Right Whale Slow Zones. You can also follow us on Facebook (@NOAAFisheriesNEMA) and Twitter (@NOAAFish_GARFO) for announcements.

DOWNLOAD THE WHALE ALERT APP FOR iPad AND iPhone FOR REAL-TIME UPDATES:

www.whalealert.org

FOR RECENT RIGHT WHALE SIGHTINGS, VISIT:

www.nefsc.noaa.gov/psb/surveys/

ACOUSTIC DETECTIONS ALONG THE U.S. EAST COAST:

robots4whales.who.edu

FOR AN AUTOMATIC RETURN EMAIL LISTING ALL CURRENT U.S. DYNAMIC MANAGEMENT AREAS AND SEASONAL MANAGEMENT AREAS, PLEASE SEND A BLANK MESSAGE TO:

NMFS.GAR.Rightwhale@noaa.gov

DETAILS AND GRAPHICS OF ALL SHIP STRIKE MANAGEMENT ZONES CURRENTLY IN EFFECT:

<https://www.fisheries.noaa.gov/national/endangered-species-conservation/reducing-ship-strikes-north-atlantic-right-whales>

APPROACHING A RIGHT WHALE CLOSER THAN 500 YARDS IS A VIOLATION OF FEDERAL AND STATE LAW. PLEASE REPORT ALL RIGHT WHALE SIGHTINGS TO: 866-755-NOAA (6622)

In addition to this current NOAA program, BOEM announced on February 7, 2022 they are working with NOAA and other partners to develop a near real-time regional passive acoustic monitoring (PAM) network to identify the larger scale movements and distribution of marine mammals, including the North Atlantic right whale.⁽⁴⁾ Thus, the near real-time program specified in the Amendment is duplicative and unnecessary.

The ongoing NOAA monitoring program (and the pending BOEM refinements to it) is largely focused on the severely endangered North Atlantic right whale. However, Section 3 of the Amendment requires design and implementation of a near real-time monitoring and mitigation program for all large whales and also prioritizes species of large whales for which vessel collisions are of particular concern regardless of stock status.

The question arises as to whether this is even feasible for NOAA and the USCG to achieve? For some perspective, it is important to note here that according to NOAA, the 5-year average of vessel strikes of North Atlantic right whales is trendless and accounts for 1.3 interactions per year.⁽⁵⁾ This relatively low number suggests the current NOAA program provides a substantial level of protection.

By comparison, NOAA reports that “due to the rare occurrence and scattered distribution, it is impossible to assess the threat of ship strikes to the Eastern North Pacific stock of right whales.”⁽⁶⁾ There is no question we should do all that is practical to avoid vessel interactions with threatened and endangered large whale species but in this latter case, is it feasible to require NOAA to design and deploy such a program in the North Pacific; or

for that matter for all large whale species regardless of stock condition and without consideration of the costs?

In addition, Section 3 requires “development of sector-specific mitigation protocols to effectively reduce takes of large whales”. The types of protocols and metric for “effective reduction” are undefined beyond “avoid and significantly reduce risk of serious injury and mortality” and as such, may serve as drivers for litigation by the animal rights community.

The time line of implementing the monitoring and mitigation program is also a problem. The Amendment specifies that not later than 3 years after date of enactment, NOAA and the USCG are required to design and implement the near real-time monitoring program with mandated mitigation protocols in place. However, NOAA is not required to submit a “preliminary” report to Congress on the implementation of the program until 2 years after enactment. Thus, there is likely going to be no sound consideration of the type, cost-benefit, economic impact, or effectiveness of the mitigation protocols before the program is implemented. This is the proverbial cart before the horse and Congress should be well aware of these issues prior to allowing the Agency to implement any such program.

The Amendment requires NOAA issue a Final Report to Congress on the pilot project including an assessment of the benefits and efficacy of the near real-time monitoring and mitigation program. Here again, the report does not include a requirement for the Agency to assess the costs and practicality of implementation on the regulated community.

In the Final Report NOAA is also required to provide a strategic plan to expand the pilot program to all large whales including “species of concern”; and to “important feeding, breeding, calving, rearing, or migratory habitats of whales”. The Amendment does not define the phrase “species of concern” which to some could mean any large whale species regardless of stock condition. And the areas included in the Amendment as “important” could also be interpreted by some to mean every place one finds marine mammals, including where ever they could be the victim of “disturbance”. This massive expansion could also lead to increased incidents of litigation, forcing the Agency to expand the scope of the program to multiple sectors.

This is an extremely disconcerting provision that will impact commercial fishing fleets from Alaska, Washington, Oregon, California, and along the entire East Coast from Maine to Florida. I believe the fishermen from Alaska and Washington know this story all too well as many have suffered, and continue to suffer, under similar conservation requirements for the Western Steller sea lion. Since the initial ESA listing in 1990, NOAA has implemented a series of restrictions on the fishing industry designed to protect sea lions from potential competition for prey, and instituted an extensive network of closed areas to protect important habitats and reduce the potential for disruption to sea lion behavior. Despite extensive conservation measures having widespread economic impacts NOAA recently reported that “At present (2021) it is unclear what continues to drive the decline of Steller sea lions in the Western Aleutians.”⁽⁷⁾ Still, extremely restrictive and disruptive conservation measures on fishing fleets remain in place.

I believe there are concerns within the commercial fishing community that the scope of the Amendment could be used to force expanded restrictions on the fishing industry to protect other large whale species in a similar manner to Steller sea lions under the provision requiring NOAA to “minimize other impacts to such whales”. The Amendment defines large whales as “all Mysticeti species, and species within the genera *Physeter* and *Orcinus*”. This definition substantially expands the program beyond plankton-dependent baleen whale species to toothed whale species that are predators on fish (e.g. competitors with commercial fishing) and marine mammals and whose stock condition may not warrant such elevated protections, or justify the costs on the regulated community.

Finally, the States of California, Oregon and Washington and their fishermen are currently dealing with developing and analyzing extensive conservation measures to reduce interactions with large whales and Dungeness crab gear, the result of a 2017 lawsuit brought by the Center for Biological Diversity and settled in 2019. The logical question here is how will this ongoing situation on the West Coast be affected by the language in this Amendment?

Recommendations: The progression of this amendment (and previously as parts of other legislative offerings) now destined to amend legislation wholly unrelated to the MMPA is particularly frustrating for the regulated community. Elements of the Amendment are duplicative and unnecessary and other broader concepts should be part of a robust discussion on reauthorization of the MMPA. While I appreciate the Subcommittee providing the opportunity for some discussion under regular order this Amendment should be wholly rejected for inclusion in the USCG reauthorization and replaced with legislation focused on grants to address scientific research needs.

If the Subcommittee intends to approve this legislation, then I respectfully request you amend Section 2(b) by adding a new subpart (5) as follows: *(5) for reimbursement to small local and tribal governments for the costs of marine mammal reporting and observation as part of an Incidental Harassment Authorization necessary to proceed with a harbor or port construction project.*

In closing, Mr. Chairman, thank you and Mr. Bentz and the Members of this Subcommittee for the opportunity to provide feedback on legislation currently before this body. As is always the case I look forward to working with you and your staff to secure positive reform of our Nation’s marine resource policies.

Literature Cited

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- (2) NOAA Announces Long-Running Plankton Survey to Resume in the Gulf of Maine; Press Story; October 22, 2020
- (3) NOAA Notification to Mariners on Right Whale Speed Restrictions; March 11, 2022
- (4) BOEM Announcing Multi-Agency Approach to Enhance Existing Protection Efforts for Endangered Right Whales; Press Release; February 7, 2022

(5) NOAA 2020 North Atlantic Right Whale Stock Assessment

(6) NOAA 2020 North Pacific Right whale Stock Assessment

(7) NOAA 2022 Steller Sea Lion Protection Measures, Alaska Region