

Calendar No. 881

110TH CONGRESS }
2d Session }

SENATE

{ REPORT
110-421 }

MARINE MAMMAL RESCUE ASSISTANCE
AMENDMENTS ACT OF 2007

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

H.R. 1006



JULY 15, 2008.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

69-010

WASHINGTON : 2008

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

DANIEL K. INOUE, Hawaii, *Chairman*

TED STEVENS, Alaska, *Vice-Chairman*

JOHN D. ROCKEFELLER IV, West Virginia	JOHN McCain, Arizona
JOHN F. KERRY, Massachusetts	KAY BAILEY HUTCHISON, Texas
BYRON L. DORGAN, North Dakota	OLYMPIA J. SNOWE, Maine
BARBARA BOXER, California	GORDON H. SMITH, Oregon
BILL NELSON, Florida	JOHN ENSIGN, Nevada
MARIA CANTWELL, Washington	JOHN E. SUNUNU, New Hampshire
FRANK R. LAUTENBERG, New Jersey	JIM DEMINT, South Carolina
MARK PRYOR, Arkansas	DAVID VITTER, Louisiana
THOMAS CARPER, Delaware	JOHN THUNE, South Dakota
CLAIRE McCASKILL, Missouri	ROGER F. WICKER, Mississippi
AMY KLOBUCHAR, Minnesota	

MARGARET CUMMISKY, *Staff Director and Chief Counsel*

LILA HELMS, *Deputy Staff Director and Policy Director*

JEAN TOAL EISEN, *Senior Advisor and Deputy Policy Director*

CHRISTINE KURTH, *Republican Staff Director and General Counsel*

PAUL J. NAGLE, *Republican Chief Counsel*

MIMI BRANIFF, *Republican Deputy Chief Counsel*

Calendar No. 881

110TH CONGRESS }
2d Session }

SENATE

{ REPORT
110-421

MARINE MAMMAL RESCUE ASSISTANCE AMENDMENTS ACT OF 2008

JULY 15, 2008.—Ordered to be printed

Mr. INOUE, from the Committee on Commerce, Science, and
Transportation, submitted the following:

REPORT

[To accompany H.R. 1006]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (H.R. 1006) to amend the provisions of law relating to the John H. Prescott Marine Mammal Rescue Assistance Grant Program, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of H.R. 1006, the Marine Mammal Rescue Assistance Amendments Act of 2008, as reported, is to amend provisions of the Marine Mammal Protection Act of 1972 (MMPA, 16 U.S.C. 1361 et. seq.) relating to the John H. Prescott Marine Mammal Rescue Assistance Grant Program. The bill would add authorization for entanglement response agreements to existing provisions relating to stranding response agreements. In addition, the bill would require the Secretary of Commerce to collect and update existing practices and procedures for rescuing and rehabilitating entangled marine mammals and would define the terms “entanglement” and “emergency assistance.”

BACKGROUND AND NEEDS

The MMPA was enacted in 1972 to protect and conserve marine mammals and established a moratorium on taking or importing marine mammals and marine mammal products, except for certain

regulated or permitted activities. The MMPA defines “take” as “to harass, hunt, capture, or kill or attempt to harass, hunt capture, or kill any marine mammal.” In 1992, Congress enacted the Marine Mammal Health and Stranding Response Act (P.L. 102—587) as Title IV of the MMPA. The Marine Mammal Health and Stranding Response Act statutorily recognized the marine mammal stranding network, established procedures for responding to unusual marine mammal mortality events, and established the National Marine Mammal Tissue Bank.

However, because most marine mammal strandings are not associated with unusual mortality events, in 2000, Congress enacted into law the John H. Prescott Marine Mammal Rescue Assistance Grant Program (P.L. 106—555). Prior to the establishment of this Federal grant program, assistance for strandings and rescues were provided by small, underfunded members of the Marine Mammal Stranding Network, who took on the financial burden to rescue and rehabilitate stranded marine mammals. The grant program defrays costs associated with the recovery and rehabilitation of marine mammals that fall outside of the existing Title IV program and allows eligible Marine Mammal Stranding Network participants to use funds to collect scientific data from live and dead animals, to improve the treatment and operation of rescue and rehabilitation centers, and to directly fund the recovery and treatment of the mammals. It is the intention of the Committee that the funds authorized in this bill may also be used for the disposal of marine mammal carcasses.

LEGISLATIVE HISTORY

The Marine Mammal Rescue Assistance Amendments Act of 2007 was introduced by Representatives Young and Brown on February 13, 2007, and passed the House of Representatives by voice vote under suspension of the rules on March 19, 2007. H.R. 1006 was referred to the Senate Committee on Commerce, Science, and Transportation on March 20, 2007. On May 15, 2008, the Committee considered the bill in an open executive session. Senator Inouye offered a substitute amendment making minor substantive and technical changes to the bill as introduced, and the Committee, without objection, ordered H.R. 1006 reported, as amended by the substitute amendment.

Staff assigned to this legislation are Amanda Hallberg, Democratic professional staff, and Todd Bertosen, Republican senior counsel.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

JUNE 19, 2008.

Hon. DANIEL K. INOUE,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1006, the Marine Mammal Rescue Assistance Amendments of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

PETER R. ORSZAG.

Enclosure.

H.R. 1006—Marine Mammal Rescue Assistance Amendments of 2008

Summary: H.R. 1006 would reauthorize funding for programs to protect and rescue marine mammals such as whales that become stranded or entangled. Assuming appropriation of the authorized amounts (beginning in 2009), CBO estimates that implementing H.R. 1006 would increase discretionary spending by \$10 million over the 2009–2013 period.

The legislation also would create an emergency fund and allow amounts in that fund, including private contributions and interest earnings, to be spent without further appropriation. Enacting this provision could increase revenues (from donations) and direct spending (from those donations and from interest earned on fund balances). CBO estimates that those changes would result in net additional spending of about \$100,000 a year, beginning in 2011.

Finally, H.R. 1006 would expand coverage under the Federal Tort Claims Act to individuals who rescue marine mammals if they are operating under an agreement with the federal government. Enacting this provision could increase direct spending from the U.S. Treasury's Judgment Fund for payments arising from tort claims, CBO estimates that any increase would be minimal.

H.R. 1006 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 1006 is shown in the following table. The costs of this legislation fall within budget function 300 (natural resources and environment).

	By fiscal year, in millions of dollars—					
	2009	2010	2011	2012	2013	2009–2013
CHANGES IN SPENDING SUBJECT TO APPROPRIATION ¹						
Authorization Level	8	8	0	0	0	15
Estimated Outlays	6	6	1	*	*	13

Note: * = less than \$500,000.

¹ Enacting H.R. 1006 also would increase revenues (from donations) and direct spending (from those revenues and from interest earned on balances of appropriated and contributed funds). CBO estimates that the net budgetary effect of such changes would be a cost of about \$100,000 a year, beginning in 2011.

Basis of estimate: For this estimate, CBO assumes that the legislation will be enacted near the end of fiscal year 2008 and that the authorized amounts will be provided as specified in the act, begin-

ning with fiscal year 2009. Estimated outlays are based on historical spending patterns for similar programs.

H.R. 1006 would authorize the appropriation of \$7.5 million for each of fiscal years 2007 through 2010 for the John H. Prescott Marine Mammal Rescue Assistance Grant Program. The authorization includes \$6 million for the National Oceanic and Atmospheric Administration (NOAA), \$1 million for the U.S. Fish and Wildlife Service (USFWS), and \$0.5 million for the Marine Mammal Unusual Mortality Event Fund (administered by NOAA). In recent years, NOAA has received appropriations of about \$4 million a year for the program, including \$0.8 million in 2005 to establish the Marine Mammal Unusual Mortality Event Fund. The USFWS also receives appropriations for this purpose, but under different statutes.

The legislation also would establish the John H. Prescott Marine Mammal Rescue and Response Emergency Fund, consisting of a portion of amounts appropriated to the agencies, private donations, and interest earnings. Amounts in the emergency fund would be available to the agencies without further appropriation.

Assuming appropriation of the authorized amounts for 2009 and 2010, CBO estimates that NOAA and the USFWS would spend a total of \$6 million in each of those years, primarily for grants to nonfederal groups that rescue marine mammals. We estimate that spending from the mortality event fund would be less than \$200,000 a year over the 2009–2013 period. Based on information provided by NOAA, we assume that the remaining \$2 million authorized to be appropriated to that agency would be deposited in the new emergency fund along with an estimated \$25,000 to \$50,000 a year from new donations from private individuals or businesses. We estimate that NOAA would spend, without further appropriation, between \$100,000 and \$200,000 annually from those donations and from interest credited to that fund for emergency rescues. Those changes would result in net spending of about \$100,000 a year, beginning in 2011.

Finally, H.R. 1006 would provide that individuals who rescue marine mammals from entanglements (from fishing nets, for example) would be considered federal employees if their actions result in claims for damages under the Federal Tort Claims Act. As a result of this provision, payments from the permanent, indefinite Judgment Fund could increase because the federal government could be held responsible for damage to fishing equipment or other private property. Based on information provided by NOAA, however, CBO estimates that any increase in direct spending would be negligible.

Intergovernmental and private-sector impact: H.R. 1006 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal Costs: Deborah Reis; Impact on State, Local, and Tribal Governments: Neil Hood; Impact on the Private Sector: Amy Petz.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

H.R. 1006, as reported, would authorize appropriations to continue and expand existing National Oceanic and Atmospheric Administration (NOAA) programs and would make a number of changes to current law. This bill would have little, if any, regulatory impact.

ECONOMIC IMPACT

This bill, as reported, would provide authorization of \$7 million for fiscal years 2007 through 2010 to the Prescott Program as well as \$500,000 for each of fiscal years 2007 through 2010 for the Marine Mammal Unusual Mortality Fund. These funding levels are not expected to have an inflationary impact on the Nation's economy.

PRIVACY

The reported bill would have little, if any, impact on the personal privacy of U.S. citizens.

PAPERWORK

The reported bill may slightly increase the paperwork requirements for NOAA when updating the stranding response agreements.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section would title this Act as the "Marine Mammal Rescue Assistance Amendments Act of 2008."

Section 2. Stranding and entanglement response

This section would amend section 403 of the MMPA (16 U.S.C. 1421b) to include the term "entanglement" to add authorization for entanglement response agreements to existing provisions relating to stranding response agreements. Section 2 would require the Secretary of Commerce to collect and update existing practices and procedures for rescuing and rehabilitating entangled marine mammals. In addition, this provision would define the terms "entanglement" and "emergency assistance." Entanglement would be defined as an event in the wild in which a living or dead marine mammal has gear, rope, line, net, or other material wrapped around or attached to it either in the water, or on a beach or shore of the

United States. Emergency assistance would be defined as response to an event that is not an unusual mortality event; leads to an immediate increase in required costs for response, recovery, or rehabilitation; may involve out-of-habitat animals; and may be cyclical or endemic or is found by the Secretary to qualify for emergency assistance.

This section also would rename the John H. Prescott Marine Mammal Rescue Assistance Grant Program as the John H. Prescott Marine Mammal and Response Funding Program and establishes an interest bearing fund of the same name in the Treasury to be used for emergency responses. This section would give the program the ability to solicit and accept gifts and other donations to increase the impact of the program. It would authorize \$7 million for fiscal years 2007 through 2010 to the Prescott Program, \$6 million of which would be made available to the Secretary of Commerce. This section also would increase the maximum support for individual projects from \$100,000 to \$200,000 annually. Finally, this section would authorize \$500,000 for each of fiscal years 2007 through 2010 for the Marine Mammal Unusual Mortality Fund, and require the Secretary of Commerce to provide grants with any funds that remain from administrative uses at the end of each fiscal year.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in *italic*, existing law in which no change is proposed is shown in roman):

MARINE MAMMAL PROTECTION ACT OF 1972

SEC. 402. DETERMINATION; DATA COLLECTION AND DISSEMINATION

[16 U.S.C. 1421]

(a) **DETERMINATION FOR RELEASE.**—The Secretary shall, in consultation with the Secretary of the Interior, the Marine Mammal Commission, and individuals with knowledge and experience in marine science, marine mammal science, marine mammal veterinary and husbandry practices, and marine conservation, including stranding network participants, develop objective criteria, after an opportunity for public review and comment, to provide guidance for determining at what point a rehabilitated marine mammal is releasable to the wild.

(b) **COLLECTION.**—The Secretary shall, in consultation with the Secretary of the Interior, collect and update, periodically, existing information on—

(1) procedures and practices for—

(A) rescuing and rehabilitating stranded *or entangled* marine mammals, including criteria used by stranding network participants, on a species-by-species basis, for determining at what point a marine mammal undergoing rescue and rehabilitation is returnable to the wild; and

- (B) collecting, preserving, labeling, and transporting marine mammal tissues for physical, chemical, and biological analyses;
 - (2) appropriate scientific literature on marine mammal health, disease, and rehabilitation;
 - (3) strandings, which the Secretary shall compile and analyze, by region, to monitor species, numbers, conditions, and causes of illnesses and deaths of stranded marine mammals; and
 - (4) other life history and reference level data, including marine mammal tissue analyses, that would allow comparison of the causes of illness and deaths in stranded marine mammals with physical, chemical, and biological environmental parameters.
- (c) AVAILABILITY.—The Secretary shall make information collected under this section available to stranding network participants and other qualified scientists.

[SEC 403. STRANDING RESPONSE AGREEMENTS.]

SEC. 403. STRANDING OR ENTANGLEMENT RESPONSE AGREEMENTS.

[16 U.S.C. 1421]

- (a) IN GENERAL.—The Secretary may enter into an agreement under section 112(c) with any person to take marine mammals under section 109(h)(1) in response to a stranding *or entanglement*.
- (b) REQUIRED PROVISION.—An agreement authorized by subsection (a) shall—
- (1) specify each person who is authorized to perform activities under the agreement; and
 - (2) specify any terms and conditions under which a person so specified may delegate that authority to another person.
- (c) REVIEW.—The Secretary shall periodically review agreements under section 112(c) that are entered into pursuant to this title, for performance adequacy and effectiveness.

SEC. 406. LIABILITY.

[16 U.S.C. 1421]

- (a) IN GENERAL.—A person who is authorized to respond to a stranding *or entanglement* pursuant to an agreement entered into under section 112(c) is deemed to be an employee of the government for purposes of chapter 171 of title 28, United States Code, with respect to actions of the person that are—
- (1) in accordance with the agreement; and
 - (2) in the case of an unusual mortality event, in accordance with—
 - (A) the contingency plan issued under section 404(b);
 - (B) the instructions of an Onsite Coordinator designated under section 404(c); or
 - (C) the best professional judgment of an Onsite Coordinator, in the case of any matter that is not covered by the contingency plan.
- (b) LIMITATION.—Subsection (a) does not apply to actions of a person described in that subsection that are grossly negligent or that constitute willful misconduct.

[SEC. 408. JOHN H. PRESCOTT MARINE MAMMAL RESCUE ASSISTANCE GRANT PROGRAM.]

SEC. 408. JOHN H. PRESCOTT MARINE MAMMAL RESCUE AND RESPONSE FUNDING PROGRAM.

[16 U.S.C. 1421]

[(a) IN GENERAL.—

[(1) Subject to the availability of appropriations, the Secretary shall conduct a grant program to be known as the John H. Prescott Marine Mammal Rescue Assistance Grant Program, to provide grants to eligible stranding network participants for the recovery or treatment of marine mammals, the collection of data from living or dead stranded marine mammals for scientific research regarding marine mammal health, and facility operation costs that are directly related to those purposes.]

(a) IN GENERAL.—(1) Subject to the availability of appropriations, the Secretary shall conduct a program to be known as the John H. Prescott Marine Mammal Rescue and Response Funding Program, to provide for the recovery or treatment of marine mammals, the collection of data from living or dead stranded marine mammals for scientific research regarding marine mammal health, facility operation costs that are directly related to those purposes, and stranding events requiring emergency assistance. All funds to implement this section shall be distributed to eligible stranding network participants for the purposes set forth in this paragraph, except as provided in subsection (f).

(2) CONTRACT AUTHORITY.—To carry out the activities set out in paragraph (1), the Secretary may enter into grants, cooperative agreements, contracts, or such other agreements or arrangements as the Secretary deems appropriate.

(3) EMERGENCY PRESCOTT FUND.—There is established in the Treasury an interest bearing fund to be known as the “John H. Prescott Marine Mammal Rescue and Response Emergency Fund”, which shall consist of a portion of amounts deposited into the Fund under subsections (h) and (i), and which shall remain available until expended without regard to any statutory or regulatory provision related to the negotiation, award, or administration of any grants, cooperative agreements, and contracts.

[(2)] (4)(A) The Secretary shall ensure that, to the greatest extent practicable, funds provided as grants under this subsection are distributed equitably among the stranding regions **[designated as of the date of the enactment of the Marine Mammal Rescue Assistance Act of 2000, and in making such grants]** *as defined in subsection (g)(3). The Secretary shall give preference to those facilities that have established records for rescuing or rehabilitating sick and stranded marine mammals in each of the respective regions, or [subregions] subregions where such facilities exist.*

(B) In determining priorities among such regions, the Secretary may consider—

(i) any episodic stranding or any mortality event other than an event described in **[section 410(6)] section 410(7)**, that occurred in any region in the preceding year;

(ii) data regarding average annual strandings and mortality events per region; and

(iii) the size of the marine mammal populations inhabiting a geographic area within such a region.

(b) APPLICATION.—To receive a grant under this section, a stranding network participant shall submit an application in such form and manner as the Secretary may prescribe.

(c) CONSULTATION.—The Secretary shall consult with the Marine Mammal Commission, a representative from each of the designated stranding regions, and other individuals who represent public and private organizations that are actively involved in rescue, rehabilitation, release, scientific research, marine conservation, and forensic science regarding stranded marine mammals, regarding the development of criteria for the implementation of the grant program and the awarding of grants under the program.

[(d) LIMITATION.—The amount of a grant under this section shall not exceed \$100,000.]

(d) LIMITATION.—*Support for an individual project under this section may not exceed \$200,000 per annum.*

(e) MATCHING REQUIREMENT.—

(1) IN GENERAL.—The non-Federal share of the costs of an activity conducted with [a grant] *funds* under this section shall be 25 percent of such *Federal* costs.

(2) IN-KIND CONTRIBUTIONS.—The Secretary may apply to the non-Federal share of an activity conducted with a grant under this section the amount of funds, and the fair market value of property and services, provided by non-Federal sources and used for the activity.

[(f) ADMINISTRATIVE EXPENSES.—Of amounts available each fiscal year to carry out this section, the Secretary may expend not more than 6 percent or \$80,000, whichever is greater, to pay the administrative expenses necessary to carry out this section.]

(f) ADMINISTRATIVE COSTS AND EXPENSES.—*Of the amounts available each fiscal year to carry out this section, the Secretary may expend not more than 6 percent or \$80,000, whichever is greater, to pay the administrative costs and administrative expenses to implement the grant program under subsection (a). Any such funds retained by the Secretary for a fiscal year for such costs and expenses that are not used for such costs and expenses before the end of the fiscal year shall be provided as grants under subsection (a).*

(g) DEFINITIONS.—In this section:

(1) DESIGNATED STRANDING REGION.—The term “designated stranding region” means a geographic region designated by the Secretary for purposes of administration of this title.

(2) EMERGENCY ASSISTANCE.—*The term “emergency assistance” means assistance provided for a stranding event—*

(A) *that—*

(i) *is not an unusual mortality event as defined in section 409(6);*

(ii) *leads to an immediate increase in required costs for stranding response, recovery, or rehabilitation in excess of regularly scheduled costs;*

(iii) *may be cyclical or endemic; and*

(iv) *may involve out-of-habitat animals; or*

(B) *is found by the Secretary to qualify for emergency assistance.*

[(2)] (3) SECRETARY.—The term “Secretary” has the meaning given that term in section 3(12)(A).

(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section [“\$5,000,000 for each of fiscal years 2001 through 2003”] *\$7,000,000 for each of fiscal years 2007 through 2010*, to remain available until expended, of which—

(1) [“\$4,000,000”] *\$6,000,000* may be available to the Secretary of Commerce; and

(2) \$1,000,000 may be available to the Secretary of the Interior.

(i) CONTRIBUTIONS.—*For purposes of carrying out this section, the Secretary may solicit, accept, receive, hold, administer, and use gifts, devises, and bequests without any further approval or administrative action.*

SEC. 410. DEFINITIONS.

[16 U.S.C. 1421]

In this title, the following definitions apply:

(1) *The term “entanglement” means an event in the wild in which a living or dead marine mammal has gear, rope, line, net, or other material wrapped around or attached to it and is—*

(A) *on a beach or shore of the United States; or*

(B) *in waters under the jurisdiction of the United States.*

[(1)] (2) The term “Fund” means the Marine Mammal Unusual Mortality Event Fund established by section 405(a).

[(2)] (3) The term “Office” means the Office of Protected Resources, in the National Marine Fisheries Service.

[(3)] (4) The term “stranding” means an event in the wild in which—

(A) a marine mammal is dead and is—

(i) on a beach or shore of the United States; or

(ii) in waters under the jurisdiction of the United States (including any navigable waters); or

(B) a marine mammal is alive and is—

(i) on a beach or shore of the United States and unable to return to the water;

(ii) on a beach or shore of the United States and, although able to return to the water, is in need of apparent medical attention; or

(iii) in the waters under the jurisdiction of the United States (including any navigable waters), but is unable to return to its natural habitat under its own power or without assistance.

[(4)] (5) The term “stranding network participant” means a person who is authorized by an agreement under section 112(c) to take marine mammals as described in section 109(h)(1) in response to a stranding.

[(5)] (6) The term “Tissue Bank” means the National Marine Tissue Bank provided for under section 407(a).

[(6)] (7) The term “unusual mortality event” means a stranding that—

(A) is unexpected;

- (B) involves a significant die-off of any marine mammal population; and
- (C) demands immediate response.

