Ocean and Coastal Law Center • School of Law • University of Oregon • Eugene 97403

Ocean Law Memo

Issue 22 July 1982

THE 1981 AMENDMENTS TO THE MARINE MAMMAL PROTECTION ACT

In 1981, Congress passed the first extensive amendments to the Marine Mammal Protection Act of 1972 (MMPA or Act). The amendments retained the primary purpose of the MMPA--to restore and maintain marine mammal populations--but revised definitions and administrative procedures that were unclear and cumbersome. This Ocean Law Memo discusses the amendments and how they affect problems which had arisen under the MMPA. Problems not resolved by the amendments also will be discussed.

THE MARINE MAMMAL PROTECTION ACT OF 1972

The MMPA was enacted to protect marine mammals from the adverse effects of human activities. Congress passed the Act in response to a public concern for the slaughter of baby harp seals in Canada, predictions of the extinction of certain whale species, and the incidental killing of porpoises by the United States tuna purse seine fleet in the Eastern Tropical Pacific. Congress sought to protect and develop the marine mammal species and population stocks to satisfy our aesthetic, recreational, economic, and ecological needs. Prior to the MMPA, only international agreements, the Endangered Species Conservation Act of 1969 (amended in 1973), and state law protected marine mammals. Management under these laws was generally ineffective.

Under the MMPA, principal administrative responsibility was divided between the Department of Commerce and Department of the Interior. The Secretary of Commerce was given jurisdiction over whales, porpoises, seals, and sea lions. The National Oceanic and Atmospheric Administration (NOAA), through the National Marine Fisheries Service (NMFS), administers Commerce's program. The Secretary of the Interior, through the Fish and Wildlife Service (FWS), has responsibility for walruses, polar bears, sea otters, marine otters, manatees, and dugongs.

The Act placed a moratorium on the taking and importing of marine mammals and marine mammal products. "Taking" was broadly defined to include all activities from attempting to harass to killing. Taking was prohibited in United States lands and waters (originally twelve miles from shore, but expanded to 200 miles in 1977) and on the high seas by U.S. nationals. Exemptions from the moratorium included taking for scientific research or public display purposes and during commercial fishing operations, if a permit was obtained from the appropriate Secretary; taking by North Pacific natives (Indians, Aleuts, and Eskimos) for subsistence purposes, native handicrafts, and clothing; taking allowed by international agreement; and a general waiver provision for use by the Secretary.

Prior to waiving the moratorium, the Secretary was required to consider the population status of the species and stocks potentially affected, and to be assured that the taking would be consistent with the Act's protection and conservation purposes. The Secretary was then required to promulgate detailed regulations to ensure that the taking was not to the disadvantage of the species or stock and that the population would not diminish below its optimum sustainable population (OSP) or cease to function significantly in the ecosystem. Permits consistent with the regulations could then be issued. The Secretary had to satisfy detailed procedural safeguards when granting a waiver, prescribing regulations, or issuing permits.

State management of marine mammals was preempted by the MMPA. A provision, however, allowed the return of management to the states if specified substantive and procedural criteria were met. Otherwise, the states were limited to helping the federal agencies enforce the Act.

Civil and criminal penalties were provided for violations of the MMPA. Seizure and forfeiture were also made available to the enforcing agencies. Other provisions of the MMPA included an international program developed in cooperation with the Secretary of State, research programs and grants, establishment of a Marine Mammal Commission to review matters concerning marine mammals and to make recommendations, reporting provisions, and appropriation authorizations.

PROBLEMS UNDER THE MMPA

One problem under the Act was that optimum sustainable population (OSP) and optimum carrying capacity (OCC), the Act's central population measurement terms, had circular and unclear definitions. Neither term had been used in traditional wildlife management and the legal application of OSP was uncertain. OSP and OCC had been treated as identical by the administrative agencies.

A second ambiguity in the Act was that a Secretary could find a species or stock depleted, and thus only subject to being taken for scientific purposes, if one of three conditions were met: (1) the species or population stock had "declined to a significant degree

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over a period of years," (2) the population decline was such that the species might be made subject to the Endangered Species Act of 1973 (ESA), or (3) the species or stock was below its OCC. "Significant degree" was not defined, however, and the Secretary was given no guidance regarding procedures for making a depletion determination or when the determination must be made.

Third, problems had arisen because of the incidental taking of porpoises by the tuna purse seine fishery. Tuna fishers, setting their net on porpoises to catch the yellowfin tuna which congregate beneath the mammals, sometimes harm or kill the porpoises. Section 1371 of the MMPA, however, declared it to "be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero mortality and serious injury rate." Since 1972, the tuna fishery has made good progress in reducing incidental taking, but still takes porpoises in the course of its operations. The regulations which allow the fishery to take a limited number of porpoises have been challenged in court by parties maintaining that tuna fishers should not be allowed to take any porpoises. This challenge threatened the American tuna fleet.

Fourth, the Act and regulations hindered efforts to gather information on the marine mammal/fishery interaction and population levels by requiring commercial fishers to obtain either a permit to take or a certificate of inclusion relating to a permit. Outside the tuna fishery, few fishers applied. Thus, when fishers accidently harassed or killed an animal, they were unwilling to report the incident, reducing the ability of agencies and scientists to obtain information needed to better understand the interaction between marine mammals and fisheries and to determine population levels.

A fifth difficulty with the Act, the procedure for giving marine mammal management jurisdiction to the states, became apparent after Alaska requested a waiver of the moratorium on takings, in connection with its request to manage marine mammals in Alaska. Alaska made its initial request regarding the walrus and eight other species in 1973. The MMPA's complex administrative notice, hearing, and review requirements, the need to prepare an environmental impact statement, the split of jurisdiction between the Department of Commerce and the Department of the Interior, and considerations involving Alaskan natives delayed the final decision. By 1979, only the management of the walrus had been given to Alaska. Then the federal district court in People of Togiak v. United States, held that the native exemption provision of the MMPA preempted Alaska's law that prohibited preferences for native uses. Alaska returned management of the walrus to the federal government and revoked its request to manage the other species.

A sixth problem concerns the exemption for native subsistence taking. The MMPA requires that native taking be for certain purposes and not be "accomplished in a wasteful manner." A Secretary cannot step in unless the species or stock subject to taking has been depleted. Considering the difficulty in rebuilding depleted populations, the actions of the Secretary might be too late for the survival of the population.

Seventh, in 1976, Congress passed the Magnuson Fishery Conservation and Management Act (FCMA), which emphasized the management and optimization of fish populations. Some commentators have said that the MMPA and the FCMA have conflicting purposes since the FCMA attempts to maximize the yield of the fish upon which the animals feed. The degree to which each act requires consideration of the other is unclear.

An eighth problem with the MMPA is the split in jurisdiction between the Departments of Commerce and the Interior. Alaska had difficulties guiding its requests through the two agencies. Research and other administrative efforts sometimes are duplicated under the dual-agency system.

A final problem with the Act is that, unlike other wildlife conservation acts, it does not provide for citizen suits. Enforcement under the Act is left to the Secretary and other federal and state agencies. Citizen participation is limited to administrative actions which occur prior to permit issuance. A citizen cannot bring suit against a person allegedly violating the MMPA.

PRELIMINARY ASSESSMENT OF THE AMENDMENTS

The 1981 Amendments dealt with many of the problems which had arisen under the MMPA. Some of the amendments clarified and simplified the Act; however, others created new uncertainty.

Optimum Sustainable Population

The 1981 Amendments to the MMPA clarify the meaning of OSP. The amendments first delete OCC from the definition of OSP, substituting carrying capacity, a scientific term meaning the maximum population of a species that the ecosystem can tolerate. Regulations promulgated under the Act defined OSP as a range between the largest population "supportable within the ecosystem" and "the population level that results in maximum net productivity." Congress, in House Report No.97-228 accompanying the amendments, accepts this definition of OSP. OSP now means:

> "with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element."

While these changes do not appear to significantly change administration of the MMPA, they do clarify Congress' intent that OSP be a population range, rather than a precise number. The removal of OCC from the Act brings the MMPA in accord with the administrative practice.

Depleted Species

The amendments clarify the population conditions necessary for a Secretary to determine that a species or population stock is depleted. The amendments declare that a population is depleted when the Secretary or managing state finds that it is below its OSP or when the species or population stock is listed as threatened or endangered under the ESA. These population criteria are more definite than those previously used in the Act, giving the Secretary more

legislative guidance. However, the Secretary still is not compelled to make the depletion finding or required to follow certain administrative procedures. The managing authority is only required to consult the Marine Mammal Commission and its Committee of Scientific Advisors prior to declaring a species or stock depleted. Considering the importance of marine mammals to special interest groups like fishers and Alaskan natives, some degree of public input, at least notice and comment, should be required.

Purse Seine Fishing for Yellowfin Tuna

The amendments declare the zero porpoise mortality goal to be satisfied by purse seine fishers for yellowfin tuna if they continue to use "the best marine mammal safety techniques and equipment that are economically and technologically practicable." Congress in this amendment recognizes that these fishers have decreased porpoise mortalities from 368,000 in 1972 to 15,303 in 1980. New techniques, such as "backing down," that allow the porpoise to escape the net, and equipment such as the Medina panel have helped produce this result. Other techniques, which include systems for detecting tuna by sound and for artificially aggregating tuna, are being developed. The amendments give purse seine tuna fishers time to develop such techniques. Opponents of the exception to the zero mortality goal have stated that the amendment will lead to a rise in porpoise deaths. However, the amendments, which require the Secretary to undertake and fund research on methods of locating and catching yellowfin tuna without the incidental take of marine mammals, will help the fishery develop additional protective techniques and reduce porpoise mortality even further.

"Small Numbers" Exceptions

The amendments state that the Secretary may allow non-tuna commercial fishers to take small numbers of mammals. This provision is meant to apply to situations such as the seal-salmon fishery interaction in Oregon, Washington, and Alaska, and the sea otter-abalone controversy in California. The amendments set forth three guidelines: (1) the mammal species or population stock may not be depleted; (2) the Secretary, after notice and comment, must find that the taking will have a negligible impact; and (3) a cooperative monitoring system must be established. The amendments also state that the Secretary shall withdraw or suspend authorization if the Secretary finds, after notice and comment, that the taking is having more than a negligible impact on the population or that the Act would be better served by disregarding this provision.

This "small numbers" provision creates much uncertainty. First, the procedure the Secretary must follow to authorize the taking is not stated. Second, the term "small numbers" is undefined in the Act. The legislative history indicates that the term refers to "infrequent, unavoidable, or accidental" takings. The vagueness of the term is compounded by the uncertainty of whether a precise number must be given when permission to take is granted. Third, the term "negligible impact" is vague and thus likely to generate controversy and litigation.

Despite these drawbacks, the "small numbers" exception process can help generate information on marine mammal-fishery interaction and population levels. At present few non-tuna fishers report incidents involving marine mammals because of frustration with the complex procedures required to obtain a permit and resentment toward having to comply with administrative red tape. By simplifying the process and removing the threat of punishment for reporting an incidental take without a permit, Congress and the agencies should receive more information regarding the frequency and impacts of marine mammal-fishery interactions and obtain more accurate population information.

The Secretary may also allow non-fishers to take small numbers of marine mammals without following the Act's regulation and permit requirements. These provisions, intended to apply to offshore oil and gas developers, are similar to the provisions allowing such takings by non-tuna fishers. However, more specificity is required since the Secretary must state precisely what activity is involved and where it will be conducted. Also, the impact of the activity on the habitat is a greater concern. Notice to the public, using local media, is required prior to the granting of permission to take. The amendments give the Secretary emergency powers to suspend permission without following notice and comment procedures. These additional procedural safeguards reflect the possibility of a greater impact in a shorter amount of time than would be possible by a fishery. The specificity requirement prevents the issuance of general permits to take marine mammals in the course of oil and gas exploration.

NOAA has issued final regulations governing small takes of marine mammals incidental to specified activities other than commercial fishing. 47 Fed. Reg. 21248 (May 18, 1982). The regulations attempt to define some of the amendment's vague terms. "Small numbers" is defined as "a portion of a marine mammal species or stock whose removal has a negligible impact on the species or stock." "Negligible impact" is that impact "which can be disregarded or which is so small or unimportant, or of so little consequence as to warrant little or no attention." The agency, using the best available scientific evidence, must determine whether the taking has a negligible impact on the species or stock, their habitat, or the availability of the species for subsistence uses.

These regulations help clarify the meaning of these terms, but they do not set strict proportional or numerical limitations. The Secretary still has a great deal of discretion to determine whether "small numbers" will be or have been taken. This is shown in the proposed regulations regarding takings of ringed seals incidental to on-ice seismic activities. The Secretary has determined that the takings will have a negligible impact on the species, stock, or subsistence requirements. Permissible methods, and monitoring and reporting requirements are imposed, but a precise number of allowable takings is not stated. The persons conducting exploration activity are not limited to taking a precise number of ringed seals. The taking is terminated only if the Secretary withdraws or terminates the authorization after notice and comment.

State Management

The amendments radically change the procedures for transferring management of marine mammals from the federal agencies to the states. First, the Secretary's transfer decision now is made after notice and comment, rather than after the lengthy hearing process previously required by the regulations

promulgated under the original Act. The legislative history is clear that judicial review is still available.

Second, the criteria the Secretary must use to review the proposed state program are clearly set forth. The state program must (1) be consistent with the Act's policies and goals and with international treaty obligations; (2) require humane takings; (3) prohibit takings until the state determines the species OSP and the number of mammals that can be taken without the population falling below OSP (the determination procedure is amended to allow the state agency to make initial findings and to require trial-type hearings only if requested); (4) prohibit takings inconsistent with OSP; (5) prohibit taking for scientific research or display purposes unless undertaken by or for the state; (6) provide for further OSP research; (7) provide a federal-state dispute resolution process; and (8) provide for annual reports. These criteria, by emphasizing OSP levels, will allow a state to implement a program which is more flexible than the present federal program. Under these provisions, states should be able to manage marine mammals in a manner more responsive to local needs. The Secretary may revoke the transfer in situations of abuse. The requirement that federal-state cooperative allocation agreements be entered into when species are involved whose range extends beyond the state's jurisdiction will help protect national interests. The amendments also provide for the Secretary's regulation, in a manner consistent with state management provisions, of marine mammals outside the managing state's territorial waters.

Other provisions allow the Secretary to provide funds to help a state develop, rather than just administer, a management plan and remove the environmental impact statement requirement. These provisions, along with the simplified transfer process, make the transfer of management authority less time-consuming and less expensive. Under the original Act, only Alaska, California, and Oregon requested return of management. These states later revoked their requests. The amendments' simplified transfer process should encourage states to seek the authority to manage marine mammals within their territorial waters. On May 12, 1982, the FWS proposed rules for the transfer of management authority to the states, 47 Fed. Reg. 20,508, as did the NMFS, 47 Fed. Reg. 21,248. The proposed regulations adhere to the requirements set forth in the Amendments.

Native Exemption

The amendments clarify the Act's native exemption provision and overrule the Togiak decision. Congress makes clear its intent to exempt from the taking moratorium only those Indians, Aleuts, or Eskimos residing in Alaska, rather than similar groups dwelling elsewhere on the North Pacific Ocean or the Arctic Ocean. Congress also explicitly overrules the decision in Togiak by stating that native takings are subject to state regulation if marine mammal management responsibility has been given to the state. However, before Alaska can obtain the return of management, it must amend its laws to conform to criteria stated in the amendments. The criteria are designed to ensure that subsistence uses of marine mammals have priority over other uses. The amendment will allow Alaska to manage native takings, but will protect the lifestyle of those dependent upon marine mammals. Customary trade, such as the selling of raw ivory from walruses, is not a permitted customary use.

PROBLEMS UNRESOLVED BY THE AMENDMENTS

Some important problems are not dealt with by the 1981 amendments. The MMPA and the Magnuson Fishery Conservation and Management Act (FCMA) are concerned with species in the same ecosystem, but, arguably, neither act, as implemented, effectively accounts for the interests of the other. To date, fishery management plans developed under the FCMA have not considered the needs of marine mammal populations. Conversely, the MMPA requires little consideration of the goals of the FCMA. The 1981 MMPA amendments require a cooperative allocation agreement between a state and the FCMA regional fishery management council when a state desires to manage a mammal whose range extends beyond the state. While this is a step in the right direction, more is necessary to ensure that both federal and state agencies consider the needs and plans of fishers so that species are managed under both acts on an ecosystem basis.

A second major problem not resolved by the amendments is the division of jurisdiction between the Department of Commerce and Department of the Interior. This division causes duplication of effort and unnecessarily complicates administration of the Act, although the Marine Mammal Commission has done much to coordinate agency activities related to marine mammals. Several improvements are possible: (1) give complete jurisdiction over fisheries to one of the two principal departments; (2) provide for better interdepartment communications; or (3) assign complete jurisdiction to a new department, like the previously proposed Department of Natural Resources. Some action seems necessary to reduce the inefficiency inherent in the division of jurisdiction.

A third problem which Congress did not resolve is that the Secretary cannot prohibit native subsistence taking unless the species or stock has become depleted. Depleted stocks could be difficult to rebuild. It would be more consistent with the protective stance of the Act to allow the Secretary to institute management measures prior to depletion.

Finally, the Act still does not contain a provision for citizen suits. Other resource conservation acts have such a provision to allow citizens to act independently of government agencies in enforcing the acts. Federal and state officials have had difficulties enforcing the MMPA prohibitions. Highly motivated private citizens, acting through special interest groups, can help enforce the Act in support of the larger public interest in proper management and protection of marine mammals.

The 1981 amendments to the MMPA also will be the subject of a Note by this memo's author to be published in the Oregon Law Review. The author wishes to thank Professor James A.R. Nafziger and Ms. Cynthia Carlson for their criticism of earlier drafts of this Memo. The remaining faults and errors, however, are the sole responsibility of the author.

Ken Schoolcraft
July 7, 1982

Ocean Law Memo is an aperiodic publication of the University of Oregon Ocean & Coastal Law Center (OCLC) and is distributed by the OSU Extension Service Sea Grant Marine Advisory Program. OCLC is supported in part by the U.S. Department of Commerce, National Oceanic & Atmospheric Administration, Sea Grant Program, Oregon State University, Corvallis, Oregon.

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