

Legal Considerations Under Federal Laws Applicable to the Management of Monk Seals on the Main Hawaiian Islands

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The purpose of this paper is to provide an overview of the statutory constraints under Federal law that limit the ability of managers to respond to the growing number of monk seals occurring in the main Hawaiian Islands and to explore the mechanisms that may be available to authorize management actions involving the taking of monk seals. While there are two primary laws that must be considered, the Marine Mammal Protection Act and the Endangered Species Act, other statutes such as the National Environmental Policy Act and the Animal Welfare Act may also come into play. Issues that could potentially arise under these statutes, however, are secondary, and likely could be more easily addressed. Consideration of these other laws are beyond the scope of this discussion. In addition, the laws of the State of Hawaii may impose further limitations on the actions that can be taken. However, those laws cannot be used to authorize any taking of a Hawaiian monk seal that would otherwise be proscribed under Federal law.

A discussion of the applicable provisions of the Marine Mammal Protection Act and the Endangered Species Act follows. Appendices providing the applicable provisions of the two statutes are also provided.

1. The Marine Mammal Protection Act

The Marine Mammal Protection Act established a general moratorium on the taking and importing of marine mammals. That moratorium, however, is not absolute and taking is, or may be, authorized in a variety of circumstances. Some of these exceptions to the taking prohibition, such as that allowing for the taking of marine mammals incidental to commercial fishing operations, clearly are not applicable to the monk seal situation and will not be discussed here. Those provisions of the Act that arguably may be applicable and those that are inapplicable, but require additional explanation as to why they are inapplicable, are discussed below.

The threshold question that must be considered is what constitutes a taking for it is only such activities that are proscribed and for which a means of authorization or avoidance is needed. The Marine Mammal Protection Act defines take to mean to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. Although capturing marine mammals could be involved in some management actions contemplated in response to monk seal activities on the main Hawaiian Islands, the most crucial element of the taking definition for the situations at issue is harassment. Harassment is statutorily defined to mean B

Any act of pursuit, torment, or annoyance which B

- (i) has the potential to injure a marine mammal or marine mammal stock in the wild; 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.@

This definition, although somewhat helpful in delineating what constitutes harassment, has not been wholly satisfactory in providing clear guidance on what does and does not constitute harassment. For instance, the introductory clause, by requiring that there be an act of pursuit, torment, or annoyance, could be interpreted as incorporating an intent element into the definition. Such an interpretation, however, would be at odds with the contemporaneous enactment of a streamlined process for authorizing incidental taking by harassment that explicitly excludes intentional taking. In addition, the definition provides no guidance for ascertaining how probable the disturbance must be to be considered harassment *B.i.e.*, is *any* potential for disturbing behavioral patterns, no matter how remote, sufficient to amount to harassment? Further, it is not clear when the disruption of individual behaviors rises to the level of disruption to behavioral patterns.

Despite the ambiguities inherent in the harassment definition, some actions, such as "hazing" monk seals to keep them from hauling out on popular beaches, clearly would fit within its ambit. Other activities, such as closely approaching marine mammals, also arguably fit within the harassment definition. Guidelines published by the National Marine Fisheries Service to limit approaches to monk seals to no closer than 50 yards presumably are premised on the heightened likelihood that taking by harassment will occur at closer distances, although the agency's enforcement officials have exhibited a reluctance to pursue cases based on close approaches alone.¹ More exact guidance as to what would constitute a taking by harassment is speculative without further input from the agencies with enforcement responsibilities.

Assuming that takings are likely to occur as monk seals re-establish themselves on the main Hawaiian Islands, we must then turn our attention to how such takings might be authorized.

Permits BSections 101(a)(1) and 104(c): Section 101(a) of the Marine Mammal Protection Act authorizes the Secretary of Commerce to issue permits for a variety of purposes, including scientific research, public display, educational or commercial photography, and enhancing the survival or recovery of a species or stock. More specific requirements for obtaining the various types of permits are described in section 104(c). Public display permits are not available for species designated as depleted, such as the Hawaiian monk seal. Thus, only

¹ The Service currently is considering the promulgation of regulations to delineate more precisely what activities constitute harassment. One option under review is the codification of the existing approach guidelines. For more information see the Service's 30 January 2002 advance notice of proposed rulemaking (67 Fed. Reg. 4379).

permits for scientific research and enhancement are considered further.

Requirements for obtaining a scientific research permit are set forth in section 104(c)(3) of the Act. Unless lethal taking is involved, which is highly unlikely with respect to the monk seals at issue, the key requirement is that the proposed taking be required to further a bona fide scientific purpose.² "Bona fide research" is defined to mean scientific research on marine mammals, the results of which (A) likely would be accepted for publication in a [refereed] scientific journal; (B) are likely to contribute to the basic knowledge of marine mammal biology or ecology; or (C) are likely to identify, evaluate, or resolve conservation problems.³ Applying this definition, it is possible to conceive of some program that could be established to address the presence of monk seals in populated areas of the Hawaiian Islands that would pass muster as constituting bona fide research. Nevertheless, the reviewing agencies (the National Marine Fisheries Service and the Marine Mammal Commission) are likely to view any permit application that appears to be designed more as a management tool than as a research program with heightened scrutiny. In addition, it should be remembered that management-related research programs (*i.e.*, those designed to test the desirability or feasibility of adopting certain management measures) tend to evolve away from being research programs and into management (or perhaps enhancement) programs as the questions being pursued are resolved. As such, relying on scientific research permits to address the problems associated with monk seals on the main Hawaiian Islands likely would, at best, provide only a short-term solution.

Another possible limitation on when and if a scientific research permit can be issued under the Marine Mammal Protection Act is included in the National Marine Fisheries Service's implementing regulations. The issuance criteria under the Service's permitting regulations (50 C.F.R. ' 216.41(b)(2)(ii)) require that, if the proposed taking will involve depleted, endangered, or threatened species, the applicant must demonstrate that the research results will directly benefit that species or stock, or will fulfill a critically important research need.⁴

The second permit type that may prove useful is that for enhancing the survival or recovery of a species or stock. Under section 104(c)(4) of the Act, such permits may be issued if

² If authorization for lethal taking is requested, even if such taking would be unintentional, the applicant must also demonstrate that alternative, non-lethal methods of conducting the research are not feasible.

the taking (1) As likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock and (2) As consistent ... with any conservation plan adopted [under the Marine Mammal Protection Act] or any recovery plan developed under...the Endangered Species Act...for the species or stock. It should be noted at the outset that the enhancement permitting authority under the Marine Mammal Protection Act is narrower in scope than the authority for such permits under the Endangered Species Act. Under the Endangered Species Act, where options for authorizing activities that result in the taking of listed species are limited, enhancement permits have been issued for a variety of activities, including captive maintenance/education programs, rescue and rehabilitation efforts, and even the importation of sport-hunted trophies in some instances where the fees paid by hunters goes to support conservation efforts. Because of the expansive reading given the enhancement permit authority under the Endangered Species Act, and the availability of other mechanisms for authorizing takes, the drafters of the Marine Mammal Protection Act provision sought to limit such authority to situations where proposed activities would directly contribute to maintaining or increasing the species or stock's distribution or numbers. Further safeguards were established for those situations in which captive maintenance is involved, but these do not appear to be of relevance to the monk seal situation at hand.

Judgment with respect to potential applications for an enhancement permit should be reserved until an application is received and the case made as to how the proposed taking would meet the statutory requirements. Nevertheless, some general observations can be made about the utility of this type of permit to address the issues surrounding monk seals in the main Hawaiian Islands. First, it seems that it would be difficult to demonstrate that an action specifically designed to limit the access of monk seals to certain areas where natural range expansion is occurring is likely to contribute to increasing the species' distribution or numbers. Second, any argument that such actions meet the statutory criteria ostensibly would rely on the theory that the population will grow to a greater extent if animals are redirected to areas where human interactions would be minimal. Such a theory ignores the fact that any such adverse effects likely fit within the Act's definition of taking. Thus, it would appear that any enhancement value gained by the taking under an enhancement permit would result only if the responsible agencies were unable or unwilling to enforce the applicable taking prohibition effectively.

Another consideration in determining whether an enhancement permit would be an appropriate mechanism for addressing the increased frequency of monk seals in the main Hawaiian Islands is the requirement that such a permit be consistent with any applicable conservation or recovery plan. Apparently, the current recovery plan for Hawaiian monk seals, adopted in 1983, does not address any issues pertaining to areas outside the Northwestern Hawaiian Islands. This is a shortcoming that needs to be addressed as part of the ongoing efforts to update the recovery plan before enhancement permits can be issued to authorize activities in the main Hawaiian Islands.

Waiver of the Taking Moratorium BSection 101(a)(3): The most generic type of taking authorization available under the Marine Mammal Protection Act is a waiver of the Act's moratorium. Taking may be authorized for a variety of purposes, including commercial

exploitation. However, because a waiver necessitates formal rulemaking, it is seldom used. Rather, those seeking authorization to take marine mammals rely on alternative provisions of the Act whenever possible, because of the procedural and substantive hurdles involved in obtaining a waiver. Among other things, an applicant seeking a waiver carries the burden of showing that the stock at issue is not depleted. Inasmuch as the Hawaiian monk seal is listed under the Endangered Species Act, it is, by definition, depleted for purposes of the Marine Mammal Protection Act. As such, a waiver is not available as a mechanism for authorizing the taking of this species.

Non-Lethal Deterrence BSection 101(a)(4): The current language of section 101(a)(4) of the Marine Mammal Protection Act was added in 1994 to provide a mechanism by which individuals may deter marine mammals from damaging their private property or endangering their personal safety. This provision also authorizes government employees to deter marine mammals from damaging public property. In all cases, however, any deterrence measures taken under this provision must not result in the death or serious injury of a marine mammal. The Secretary of Commerce³ was directed to publish a list of guidelines that could be used for safely deterring marine mammals. Deterrence actions consistent with those guidelines do not constitute a violation of the Act.

The National Marine Fisheries Service published a proposed deterrence rule in 1995, but has never finalized those regulations. Thus, it is unclear what, if any, deterrence actions currently can be taken under the authority of section 101(a)(4). Arguably, deterrence measures under that provision would not be authorized until final guidelines are in place. Furthermore, anyone engaged in deterrence actions would be ill-advised to use any of the techniques identified as being impermissible under the proposed rule. These include using (1) firearms or any other device to propel an object that could result in injury, (2) any explosive device on cetaceans or any explosive device more powerful than a seal bomb on seals and sea lions, (3) translocation, or (4) tainted bait, poisons, or any other substance intended for consumption by a marine mammal.

Among the deterrence measures that would be acceptable under the proposed regulations are passive techniques such as constructing fences or other barriers to prevent marine mammals from accessing areas where property damage or other injury might occur. This suggests that, at least in the Service's view, constructing such barriers to exclude marine mammals, even when the animals may not be taken in the course of construction, fits within the definition of taking and requires some sort of authorization.

Section 101(a)(4) further directs the Secretary of Commerce to recommend specific measures for the non-lethal deterrence of marine mammals listed as endangered or threatened under the Endangered Species Act Bthe implication being that no deterrence of listed species is allowed until such measures have been published. Inasmuch as the National Marine Fisheries

³ This requirement also applies to the Secretary of the Interior for species under that Department's jurisdiction.

Service has yet to identify any measures that can be safely used for deterring endangered or threatened species, it appears that deterrence of Hawaiian monk seals under this provision is currently not an option. This is not to say that the Service might not conclude its rulemaking and identify appropriate deterrence measures for monk seals. Until it does this, however, reliance on the deterrence authorization of section 101(a)(4) is unfounded.

Even if the Service were to take such steps, the value of this provision as the basis for management actions with respect to monk seals on the main Hawaiian Islands is questionable. Deterrence measures may be taken only in response to a fairly narrow set of circumstances involving damage to property or endangerment of personal safety. A monk seal hauling out on a beach, without doing physical harm to facilities, even if it precluded use of the beach by the public, would not be a sufficient basis for using deterrence measures.

Small Take Authorization BSection 101(a)(5): Section 101(a)(5) contains two different mechanisms for authorizing the taking of marine mammals incidental to otherwise lawful activities. A streamlined procedure is available for authorizing taking by harassment only. Rulemaking is required to authorize incidental taking by other than harassment or if more than a one-year authorization is being sought. In either case, the issuing agency must determine that the taking will have no more than a negligible impact on the affected species or stock. Because this provision applies only to incidental, and not intentional taking, it is of limited utility in addressing the issues surrounding monk seals on the main Hawaiian Islands.

It is conceivable that some types of activities, such as routine access to beaches, could continue unabated, even when monk seals appear, if an authorization for incidental taking were issued. If this were done, the mere presence of people in an area, going about their normal activities, might be sufficient to discourage monk seals from frequenting such areas. Nevertheless, there are considerable impediments and drawbacks to relying on this approach.

First, small take authorizations are only available to citizens of the United States and therefore, an authorization could not cover all Hawaiian residents and tourists who are likely to use a beach or who may come into contact with a monk seal. Second, it is not clear who the applicant would be. It is unrealistic to believe that any individual would be willing or able to pursue this option. Perhaps a State or Federal agency would be willing to apply on behalf of Hawaii's citizenry (similar to what is being contemplated to authorize the incidental taking of manatees by boaters in Florida), but it is unclear how the conditions of such an authorization would be enforced. Third, and perhaps most important, is the requirement that any authorization under section 101(a)(5) be designed to have the least practicable adverse impact on the species or stock. This requirement could be interpreted as requiring anyone covered by the incidental take authorization to avoid taking whenever possible, *e.g.*, by not entering areas when monk seals are present, which would defeat the whole purpose of obtaining the authorization.

Taking in Defense of Self or Others BSection 101(c): This provision was added in 1994 to enable people to respond to life-threatening situations involving marine mammals without running afoul of the Marine Mammal Protection Act's taking prohibition. Unlike the deterrence authority of section 101(a)(4) discussed above, it allows the use of lethal force, when necessary.

This provision was designed with large, dangerous marine mammals, such as polar bears, in mind. It is unlikely to be invoked with respect to Hawaiian monk seals. Even if it were, there is an additional impediment. The Endangered Species Act contains no parallel authorization. Thus, taking of marine mammals listed as endangered or threatened would still constitute a violation of that Act.

Taking by Public Officials or Designees BSection 109(h): This provision authorizes Federal, State, and local government officials, acting in the course of their official duties, and those designated by the National Marine Fisheries Service to take marine mammals for any of three purposes. These are (1) ~~A~~the protection or welfare of the mammal, (2) ~~A~~the protection of the public health and welfare, and (3) ~~A~~the nonlethal removal of nuisance animals. Each of these exceptions is open to varying interpretations, depending on what one views as being in the animal's or the public's best interest, or as constituting a nuisance animal. In this case, neither the statute itself nor the Service's implementing regulations (50 C.F.R. 216.22) provide additional guidance as to the meaning of these terms.

In resolving cases where a statutory provision is ambiguous on its face, courts traditionally turn to the legislative history to shed further light on its meaning by drawing on the Congressional intent behind its enactment. One could argue that section 109(h) should be interpreted broadly to provide the agencies with maximum flexibility to resolve resource conflicts. For instance, removing monk seals from popular beaches, or preventing them from moving into certain areas, could be viewed by some as protecting the public health and welfare, or even promoting the welfare of the animals by reducing the incidence of interactions with humans. Such broad interpretations of the statutory provisions, however, do not appear to be supported by the legislative history of the Act.

As originally enacted in 1972, the provision authorizing taking by public officials was limited to the first two elements. The authorization for the non-lethal removal of nuisance animals was added in 1981. The legislative history of the original provision is scant, consisting of a single exchange between two Senators as an amendment to add these exceptions to the taking prohibition was being considered (see 118 Cong. Rec. S. 25291). Senator Gurney, who introduced the amendment, indicated that it was intended to allow officials to act quickly to respond to emergency situations such as marine mammal strandings. Senator Hollings, the floor manager of the bill, echoed this characterization, stating that ~~A~~the amendment is merely to provide for emergency situations....It is a purely innocent amendment.

Section 109 was extensively revised in 1981, at which time the nuisance animal exception was added. The only guidance as to the intent behind this provision is set forth in the report on the bill prepared by the House Committee on Merchant Marine and Fisheries (H.R. Rpt. No. 228, 97th Cong., 1st Sess. 29). As an example of when taking of a nuisance animal would be allowed, the Committee noted that it would cover the removal of harbor seals trapped in fish ladders.

In light of the legislative history of the provisions pertaining to the taking of marine

mammals for their protection or welfare or for the protection of the public health and welfare, it is best to interpret these exceptions narrowly. They seem designed primarily to enable officials to respond quickly to emergencies in which an animal's life or health is imperiled or public health or safety is at risk.⁴ This is the position recommended by the Marine Mammal Commission and adopted by the National Marine Fisheries Service in 1990, when the State of Washington sought to invoke the public health and welfare component of section 109(h) as a means to protect other public resources (in that case, fish stocks) from predation and damage by pinnipeds. A more expansive interpretation of the public health and welfare provision may be a tempting alternative to some to address issues concerning monk seals on the main Hawaiian Islands. However, any such interpretation is likely to be precedent-setting and may open the door for others to argue that other public welfare considerations, including economic interests, warrant the taking of marine mammals under section 109(h).

Determining the scope of the nuisance animal exception is a bit trickier, in part because of the sparse legislative history behind the 1981 amendment. The core issue is to define what constitutes a nuisance. In the legal context, an action for nuisance is premised on an unreasonable, unwarranted, or unlawful use of one's property. To draw the parallel to the marine mammal world, this suggests that, to constitute a nuisance, the animal must be acting in an unusual or harmful way. Under such a theory, merely swimming near the shore or hauling out on a beach, although perhaps inconvenient for the human population in the area, would not by itself constitute a nuisance.

Another method for deciding what constitutes a nuisance for purposes of section 109(h) is to ascribe the meaning to the term as defined in a dictionary of common usage. This approach, too, is not likely to be determinative and will no doubt vary depending on the dictionary selected. For example, Webster's Collegiate Dictionary defines nuisance as requiring some type of harm or injury. In contrast, the American Heritage Dictionary defines the term as something that is Anconvenient, annoying, or vexatious. Under this latter definition, the inconvenience created by a monk seal occupying an area within the main Hawaiian Islands may be sufficient to constitute a nuisance, providing the necessary legal hook for relocating the animal.

Although resolving precisely what would or would not be considered a Nuisance animal for purposes of section 109(h) of the Marine Mammal Protection Act is beyond the scope of this paper, it is safe to say that the responsible agencies have some degree of latitude in defining this phrase. This being the case, those agencies might want to consider the promulgation of a regulatory definition of the term, particularly if it determines that monk seals, by their mere presence in certain areas, are to be considered a nuisance. As with the adoption of an expansive reading of the public welfare provision, a cautious approach is warranted here as well. If a marine mammal that is not behaving in an aberrant manner is considered to be a nuisance solely

⁴ This would include the removal of marine mammal carcasses from public areas, which although arguably not an emergency, present public health and safety concerns if left to natural decomposition processes.

because its presence is judged to be inconvenient to potentially competing uses of public areas or resources, section 109(h) would be theoretically be open for use to authorize taking in a variety of situations heretofore not contemplated and, if abused, could run afoul of the Act's policy of protecting essential habitats from the adverse effects of man's actions.

2. The Endangered Species Act

The Hawaiian monk seal was listed as an endangered species under the Endangered Species Act in 1976 and therefore is subject to that Act as well as to the Marine Mammal Protection Act. As with the Marine Mammal Protection Act, the Endangered Species Act prohibits the unauthorized taking of species under its coverage. However, the definition of take differs somewhat under the two statutes. As defined in the Endangered Species Act, take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Unlike the Marine Mammal Protection Act, the Endangered Species Act contains no definition of harassment, and no regulatory definition of the term has been codified. Absent any indication to the contrary, it is reasonable to assume that harassment would be interpreted similarly under the two Acts.

At the outset, it should be noted that section 17 of the Endangered Species Act provides clear guidance as to how any inconsistencies in the provisions of that Act and the Marine Mammal Protection Act are to be resolved. Section 17 states that, except as otherwise provided in the Act, no provision of the Endangered Species Act shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act. Thus, if a taking can be authorized under the Endangered Species Act, but a similar authorization is not available under the Marine Mammal Protection Act, the taking cannot be allowed. Although not explicit in either Act, it should also be assumed that the converse proposition is true. That is, if a type of taking can be authorized under the Marine Mammal Protection Act, but not the Endangered Species Act, then such taking cannot be permitted.

Section 10 of the Endangered Species Act sets forth the exceptions to the otherwise applicable taking prohibition of the Act. The only section 10 exceptions that are relevant to the monk seal situation are those provided in subsection (a), which authorizes the Secretary of Commerce to issue permits for scientific purposes, to enhance the survival of the affected species (including the establishment of experimental populations), or to authorize taking incidental to otherwise lawful activities. In large part, the research and enhancement exceptions parallel those provided under the Marine Mammal Protection Act. The one notable difference, as discussed above, is the greater breadth that has been afforded the enhancement permitting authority under the Endangered Species Act.

In practice, the authorization of incidental taking under section 10 differs markedly from the process under the Marine Mammal Protection Act. This provision has been used exclusively to authorize incidental taking of listed species in situations where the applicant has developed and committed to implementing a long-term conservation plan designed to mitigate any authorized taking. To date, this provision has not been used to authorize the incidental taking of

any marine mammal species. Rather, such takings have been authorized under section 7 of the Act, which governs interagency consultations on Federal actions to ensure that they are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.⁵ Under section 7(b)(4), the Secretary is directed to authorize the anticipated level of incidental takings if a No jeopardy opinion is issued or reasonable and prudent alternatives are identified that will bring the action into compliance with the requirements of section 7. If listed species of marine mammals are involved, the taking must also be authorized under section 101(a)(5) of the Marine Mammal Protection Act. In its implementing regulations, the Service has indicated that consideration of an incidental taking request under the Marine Mammal Protection Act is a federal action sufficient to trigger the consultation requirements of the Endangered Species Act. As such, no application under the Endangered Species Act is required. As with the Marine Mammal Protection Act incidental taking authority, it should be cautioned that the Endangered Species Act provision is geared toward the authorization of incidental, rather than directed, taking and therefore is of limited utility in addressing the issues surrounding the presence of monk seals in the main Hawaiian Islands.

The one other provision of the Endangered Species Act that merits mention is section 6(f), which specifies that States may adopt laws with respect to the taking of endangered or threatened species that are more restrictive than provided for under the Act.⁶ Thus, we must be concerned not only with the applicable Federal statutes, but with Hawaiian laws as well. The author's review of Chapter 195D of Hawaii's Revised Statutes, which pertain to the conservation of aquatic life, wildlife, and land plants, and the applicable administrative rules (Title 13, Subtitle 5, Part 2, Chapter 124) did not reveal any respect in which Hawaiian law would clearly be more restrictive than Federal law. This view is based, in part on the assumption that the State interprets its exceptions pertaining to scientific, propagation, and educational permits as being roughly equivalent to the research and enhancement permits available under the Endangered Species Act. One area of possible concern is the fact that Hawaiian law does not appear to include a mechanism for authorizing incidental taking. It is recommended that State officials provide the workshop participants with their views as to whether and, if so, how, Hawaiian law might be more restrictive than the Endangered Species Act.

⁵ It should also be recognized that whatever actions are taken or authorized by the National Marine Fisheries Service with respect to Hawaiian monk seals will need to meet the requirements of section 7.

⁶ This is in direct contrast to the Marine Mammal Protection Act, which, in section 109(a), specifically preempts State laws and regulations related to the taking of marine mammals unless the State has been transferred management under section 109. Reconciling the conflicting directives of the two statutes as they pertain to State authority over endangered and threatened marine mammals has not been addressed by the courts and so remains an open issue. However, the National Marine Fisheries Service, in practice, has recognized the rights of States to regulate the taking of listed marine mammals.

Appendix A B Provisions of the Marine Mammal Protection Act

Section 2(13) The term "take" means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

Section 2(18)(A) The term "harassment" means any act of pursuit, torment, or annoyance whichC

(i) has the potential to injure a marine mammal or marine mammal stock in the wild; 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.

(B) The term "Level A harassment" means harassment described in subparagraph (A) (i).

(C) The term "Level B harassment" means harassment described in subparagraph (A) (ii).

Section 2(22) The term "bona fide research" means scientific research on marine mammals, the results of whichC

(A) likely would be accepted for publication in a referred⁷ scientific journal;

(B) are likely to contribute to the basic knowledge of marine mammal biology or ecology; or

(C) are likely to identify, evaluate, or resolve conservation problems.

Section 101(a)(3)(B) Except for scientific research purposes, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock as provided for in

⁷ As in original. Presumably this should read Arefereed.@

paragraph (1) of this subsection, or as provided for under paragraph (5) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal.

Section 101(a)(4)(A) Except as provided in subparagraphs (B) and (C), the provisions of this Act shall not apply to the use of measures

(i) by the owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch;

(ii) by the owner of other private property, or an agent, bailee, or employee of such owner, to deter a marine mammal from damaging private property;

(iii) by any person, to deter a marine mammal from endangering personal safety; or

(iv) by a government employee, to deter a marine mammal from damaging public property,

so long as such measures do not result in the death or serious injury of a marine mammal.

(B) The Secretary shall, through consultation with appropriate experts, and after notice and opportunity for public comment, publish in the Federal Register a list of guidelines for use in safely deterring marine mammals. In the case of marine mammals listed as endangered species or threatened species under the Endangered Species Act of 1973, the Secretary shall recommend specific measures which may be used to nonlethally deter marine mammals. Actions to deter marine mammals consistent with such guidelines or specific measures shall not be a violation of this Act.

(C) If the Secretary determines, using the best scientific information available, that certain forms of deterrence have a significant adverse effect on marine mammals, the Secretary may prohibit such deterrent methods, after notice and opportunity for public comment, through regulation under this Act.

(D) The authority to deter marine mammals pursuant to subparagraph (A) applies to all marine mammals, including all stocks designated as depleted under this Act.

Section 101(a)(5)(A) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public

commentC

(i) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) or section 109(f) or, in the case of a cooperative agreement under both this Act and the Whaling Convention Act of 1949, pursuant to section 112(c); and

(ii) prescribes regulations setting forthC

(I) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses; and

(II) requirements pertaining to the monitoring and reporting of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain (either on an individual or class basis, as appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity within a specified geographical region if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless subparagraph (C)(i) applies), thatC

(i) the regulations prescribed under subparagraph (A) regarding methods of taking, monitoring, or reporting are not being substantially complied with by a person engaging in such activity; or

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.

(C)(i) The requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.

(ii) Sections 103 and 104 shall not apply to the taking of marine mammals under the authority of this paragraph.

(D)(i) Upon request therefor by citizens of the United States who engage in a specified

activity (other than commercial fishing) within a specific geographic region, the Secretary shall authorize, for periods of not more than 1 year, subject to such conditions as the Secretary may specify, the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock by such citizens while engaging in that activity within that region if the Secretary finds that such harassment during each period concernedC

(I) will have a negligible impact on such species or stock, and

(II) will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b), or section 109(f) or pursuant to a cooperative agreement under section 119.

(ii) The authorization for such activity shall prescribe, where applicableC

(I) permissible methods of taking by harassment pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) or section 109(f) or pursuant to a cooperative agreement under section 119,

(II) the measures that the Secretary determines are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for taking for subsistence uses pursuant to subsection (b) or section 109(f) or pursuant to a cooperative agreement under section 119, and

(III) requirements pertaining to the monitoring and reporting of such taking by harassment, including requirements for the independent peer review of proposed monitoring plans or other research proposals where the proposed activity may affect the availability of a species or stock for taking for subsistence uses pursuant to subsection (b) or section 109(f) or pursuant to a cooperative agreement under section 119.

(iii) The Secretary shall publish a proposed authorization not later than 45 days after receiving an application under this subparagraph and request public comment through notice in the Federal Register, newspapers of general circulation, and appropriate electronic media and to all locally affected communities for a period of 30 days after publication. Not later than 45 days after the close of the public comment period, if the Secretary makes the findings set forth in clause (i), the Secretary shall issue an authorization with appropriate conditions to meet the requirements of clause (ii).

(iv) The Secretary shall modify, suspend, or revoke an authorization if the Secretary finds that the provisions of clauses (i) or (ii) are not being met.

(v) A person conducting an activity for which an authorization has been granted under this subparagraph shall not be subject to the penalties of this Act for taking by harassment that occurs in compliance with such authorization.

Section 101(c) It shall not be a violation of this Act to take a marine mammal if such taking is imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported to the Secretary within 48 hours. The Secretary may seize and dispose of any carcass.

Section 104(c)(3)(A) The Secretary may issue a permit under this paragraph for scientific research purposes to an applicant which submits with its permit application information indicating that the taking is required to further a bona fide scientific purpose. The Secretary may issue a permit under this paragraph before the end of the public review and comment period required under subsection (d)(2) if delaying issuance of the permit could result in injury to a species, stock, or individual, or in loss of unique research opportunities.

(B) No permit issued for purposes of scientific research shall authorize the lethal taking of a marine mammal unless the applicant demonstrates that a nonlethal method of conducting the research is not feasible. The Secretary shall not issue a permit for research which involves the lethal taking of a marine mammal from a species or stock that is depleted, unless the Secretary determines that the results of such research will directly benefit that species or stock, or that such research fulfills a critically important research need.

(C) Not later than 120 days after the date of enactment of the Marine Mammal Protection Act Amendments of 1994 [August 28, 1994], the Secretary shall issue a general authorization and implementing regulations allowing bona fide scientific research that may result only in taking by Level B harassment of a marine mammal. Such authorization shall apply to persons which submit, by 60 days before commencement of such research, a letter of intent via certified mail to the Secretary containing the following:

- (i) The species or stocks of marine mammals which may be harassed.
- (ii) The geographic location of the research.
- (iii) The period of time over which the research will be conducted.
- (iv) The purpose of the research, including a description of how the definition of bona fide research as established under this Act would apply.
- (v) Methods to be used to conduct the research.

Not later than 30 days after receipt of a letter of intent to conduct scientific research under the

general authorization, the Secretary shall issue a letter to the applicant confirming that the general authorization applies, or, if the proposed research is likely to result in the taking (including Level A harassment) of a marine mammal, shall notify the applicant that subparagraph (A) applies.

Section 104(c)(4)(A) A permit may be issued for enhancing the survival or recovery of a species or stock only with respect to a species or stock for which the Secretary, after consultation with the Marine Mammal Commission and after notice and opportunity for public comment, has first determined that

(i) taking or importation is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock; and

(ii) taking or importation is consistent (I) with any conservation plan adopted by the Secretary under section 115(b) of this title or any recovery plan developed under section 4(f) of the Endangered Species Act of 1973 for the species or stock, or (II) if there is no conservation or recovery plan in place, with the Secretary's evaluation of actions required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation plan or a recovery plan.

(B) A permit issued in accordance with this paragraph may allow the captive maintenance of a marine mammal from a depleted species or stock only if the Secretary

(i) determines that captive maintenance is likely to contribute to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves;

(ii) determines that the expected benefit to the affected species or stock outweighs the expected benefit of alternatives which do not require removal of animals from the wild; and

(iii) requires that the marine mammal or its progeny be returned to the natural habitat of the species or stock as soon as feasible, consistent with the objectives of any applicable conservation plan or recovery plan, or of any evaluation by the Secretary under subparagraph (A).

The Secretary may allow the public display of such a marine mammal only if the Secretary determines that such display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives.

Section 109 (h)(1) Nothing in this title or title IV shall prevent a Federal, State, or local government official or employee or a person designated under section 112(c) from taking, in the

course of his or her duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for

- (A) the protection or welfare of the mammal,
- (B) the protection of the public health and welfare, or
- (C) the nonlethal removal of nuisance animals.

(2) Nothing in this title shall prevent the Secretary or a person designated under section 112(c) from importing a marine mammal into the United States if such importation is necessary to render medical treatment that is not otherwise available.

(3) In any case in which it is feasible to return to its natural habitat a marine mammal taken or imported under circumstances described in this subsection, steps to achieve that result shall be taken.

Appendix B B Provisions of the Endangered Species Act

Section 10(a)(1) The Secretary may permit, under such terms and conditions as he shall prescribe

(A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); or

(B) any taking otherwise prohibited by subsection 9(a)(1)(B) if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2)(A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies

- (i) the impact which will likely result from such taking;
- (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

(B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan thatB

(i) the taking will be incidental;

(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(iii) the applicant will ensure that adequate funding for the plan will be provided;

(iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary and appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.