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Regulatory Framework for Marine Mammals and Human-Made Sound ***Case Study – United States***

Policy on Sound and Marine Mammals: An International Workshop

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U.S. Laws

Laws of Primary Importance

- Marine Mammal Protection Act (MMPA)
- Endangered Species Act (ESA)

Laws of Secondary Importance

- National Environmental Policy Act (NEPA)
- Outer Continental Shelf Lands Act (OCSLA)
- Coastal Zone Management Act (CZMA)

Marine Mammal Protection Act

- Passed in 1972—Amended several times since with the most recent comprehensive amendments in 1994. The 1994 amendments include the definition of harassment (Level A and Level B) and provide for issuance of Incidental Harassment Authorizations
- MMPA was the first legislation to mandate an ecosystem approach to marine resource management
 - Primary objective to maintain the health and stability of the marine ecosystem
 - Secondary objective to obtain and maintain optimum sustainable populations (OSP) of marine mammals
 - Established specific regulations for depleted populations, i.e., those below their OSP

Marine Mammal Protection Act

Optimum Sustainable Population

- 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

Marine Mammal Protection Act

Placed a moratorium on “taking” and importing marine mammals and marine mammal parts except when authorized (e.g., Letter of Authorization, Incidental Harassment Authorization, Native exception, fisheries-related takes, permits, etc.)

“Take” means to harass, hunt, capture, or kill or attempt to harass, hunt, capture or kill any marine mammal

Marine Mammal Protection Act

Harassment is any act of pursuit, torment, or annoyance which:

- has the potential to injure a marine mammal or marine mammal stock in the wild [Level A]
- has the potential to disturb a marine mammal or a marine mammal stock in the wild by causing disruption of behavioral patterns including, but not limited to, migration, breeding, nursing, breathing, feeding, or sheltering [Level B]

Marine Mammal Protection Act

Harassment for the U.S. Navy and Federally-funded research is slightly different, as of 2003:

- any act which injures or has the *significant* potential to injure a marine mammal or marine mammal stock in the wild [Level A]
- Any act which *disturbs or is likely* to disturb a marine mammal or a marine mammal stock in the wild by causing disruption of natural behavioral patterns including, but not limited to, migration, *surfacing*, nursing, breeding, feeding, or sheltering, *to a point where such behavior patterns are abandoned or significantly altered* [Level B]

Marine Mammal Protection Act

All research on marine mammals, including research to determine how they receive and react to sound, may be conducted only under an approved scientific research permit

Marine Mammal Protection Act

Other activities that introduce sound into the marine environment such as geophysical research, resource extraction activities, and construction need to obtain a Letter of Authorization or an Incidental Harassment Authorization demonstrating:

- Negligible impact
- Specified geographical region
- Small numbers

Marine Mammal Protection Act

An Incidental Harassment Authorization may be obtained if:

- There is no potential for serious injury or mortality; or,
- The potential for serious injury or mortality can be negated through mitigation requirements that could be required under the authorization

If there is a potential for serious injury or mortality that cannot be mitigated, a Letter of Authorization is required

Marine Mammal Protection Act

- Although the act was stimulated by the take of pelagic dolphins in the yellowfin tuna industry, the fishing industry is regulated under a more liberal set of requirements provided they:
 - Register
 - Accept observers
 - Comply with requirements of Take Reduction Plans
 - Report all marine mammals mortalities or severe injuries

Marine Mammal Protection Act

Noise associated with shipping activities has never been regulated under MMPA. Shipping has never received an Incidental Harassment Authorization in spite of introducing the greatest amount of human generated sound energy into the marine environment

Marine Mammal Protection Act

Provisions of the MMPA apply to all citizens of the United States conducting activities worldwide with the exception of activities within the territory of another country, in which case the laws of that country apply

Endangered Species Act

“The United States has pledged itself...to conserve to the extent practicable the various species...facing extinction”

The ESA establishes national policy for the protection and conservation of threatened and endangered species and the ecosystems on which they depend

Endangered Species Act

ESA prohibits “taking” of any endangered species

“Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct”

Regulation has extended this protection to threatened as well as endangered species

Endangered Species Act

Prior to any Federal action that may affect a threatened or endangered species, the agency responsible for the action must consult with the agency responsible for the protection of the species to ensure that the action is not likely to jeopardize the continued existence of the species

The consultation may result in a Biological Opinion that includes recommended “reasonable and prudent” measures designed to mitigate impacts of the proposed activities

Endangered Species Act

- In any instance in which MMPA is more restrictive than ESA, MMPA takes precedent
 - MMPA Negligible Impact is more restrictive than ESA Jeopardy
 - Incidental Take Authorization under ESA requires a prior ITA under MMPA

National Environmental Policy Act

The purpose of NEPA is:

- To declare a national policy which will encourage productive and enjoyable harmony between man and his environment
- To promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man
- To enrich the understanding of the ecological systems and natural resources important to the Nation

National Environmental Policy Act

- NEPA is a procedural act rather than one establishing specific substantive requirements
- Federal Agencies must review the potential environmental impacts of the activities they conduct, fund, or permit
- There are three levels of review
 - Categorical Exclusion
 - Environmental Assessment
 - Environmental Impact Statement

National Environmental Policy Act

- An Environmental Impact Statement (EIS) is prepared whenever a “finding of no significant impact” cannot be made
 - The EIS identifies adverse environmental effects that cannot be avoided or mitigated
 - The EIS has to consider alternatives to the proposed activity, including “no action”

Outer Continental Shelf Lands Act

The OCSLA establishes Federal ownership of, and jurisdiction over, submerged lands on the outer continental shelf seaward of state boundaries to 200 miles

OCSLA is administered by the Minerals Management Service which reviews all oil, gas, and other extractable resource leases for compliance with MMPA and ESA

OCSLA is designed to promote the responsible development of off shore resources

Coastal Zone Management Act

Under CZMA, proposed Federal activities in the state's coastal zones (generally out to 3 miles off shore) must be consistent with the state's Coastal Zone Management Program

State agencies may object to granting a "consistency certification" if any proposed Federal activity is inconsistent with their programs

Coastal Zone Management Act

If states have regulations related to impacts from anthropogenic sound on marine mammals, Federal activities in state waters must seek consistency certification

If states object to activities deemed “necessary in the interest or national security,” the act states that additional information provided by the Department of Defense or other Federal agencies “shall be given considerable weight”