

Management Authority for Populations at OSP Under the MMPA

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“Listen -- I bought these here yesterday and the dang things won’t stop squeaking.”

General Principles for MMPA Interpretation and Application

Case law and MMPA legislative history

- Conservative basis in favor of marine mammals – precautionary principle
- MMPA for benefit of marine mammals and not for parties engaged commercial activities
- Burden of proof on parties seeking take/import authorization

MMPA Moratorium

Section 101(a)

There shall be a moratorium on the taking and importation of marine mammals and marine mammal products . . . except in the following cases --

16 U.S.C. § 1371(a)

MMPA Waiver of the Moratorium

Section 101(a)(3)(A)

The Secretary . . . is *authorized and directed, from time to time*, to determine when, to what extent, if at all, and by what means it *is compatible with [the MMPA]* to *waive* the requirements of section 101 [the moratorium] so as to allow taking, or importing of any marine mammal, or any marine mammal product

16 U.S.C. § 1373(a)(3)

Standards for a Waiver

Section 101(a)(3)(A)

- Best available science
- In consultation with MMC
- “Due regard” to marine mammal biological factors
- Compatible with the MMPA
- For importation, certification that foreign nation’s program for taking marine mammals is consistent with MMPA
- Make determinations under sections 102, 103, 104
- Must be “assured that the taking of such marine mammal is in accord with *sound principles of resource protection and conservation* as provided in the *purposes and policies of [the MMPA]*”

16 U.S.C. § 1371(a)(3)

Purposes and Policies of the MMPA

Section 2(6)

- Primary objective of marine mammal management should be to maintain the health and stability of the marine ecosystem
- Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population (OSP) keeping in mind the carrying capacity of the habitat

16 U.S.C. § 1361(6)

Purposes of the MMPA

Section 2(2)

- Should *not be permitted to diminish* beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part
- Consistent with this major objective, should *not be permitted to diminish below their OSP*
- Measures should be immediately taken to *replenish* only species or stock below OSP
- In particular, efforts should be taken to protect essential habitats . . . from the adverse effect of any actions

16 U.S.C. § 1361(2)

MMPA Definition – “Conservation”

Section 3(2)

- The “application of biological information for the purposes of increasing and maintaining the number of animals” at OSP
- The “entire scope of activities that constitute a modern scientific resource program . . . including habitat acquisition and improvement”
- “When and where appropriate – periodic or total protection . . . as well as regulated taking”

16 U.S.C. § 1362(3)

What is OSP?

Section 2(9)

- OSP is “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.” 16 U.S.C. § 1362(9).

Regulation

...a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality. 50 C.F.R. § 216.3.

The 60% Principle

Maximum Net Productivity Level (MNPL) = 50 to 70% of carrying capacity (K)

General principle as applied = 60 of K is lower end of MNPL

When is a Population Depleted?

Section 3(1)

Depletion

- Secretary, in consultation with the MMC and Committee of Scientific Advisors, determines species of stock is below OSP
- State with transfer authority determines to be below OSP
- Listed under ESA

16 U.S.C. § 1362(3)

MMPA Key Concepts – OSP/Depleted

- Protection associated with depleted status
 - No waiver of moratorium
 - No public display
 - Enhanced protection of incidental take
 - Regulate Native take
 - Enhanced species recovery tools
 - Not subject to control under section 120 for predation

Section 102 - Prohibitions

Depletion

- No importation of mammal that is pregnant, nursing/less than eight months, cannot be taken from a depleted stock, taken in inhumane manner, taken in violation of law
- Taken for commercial whaling

16 U.S.C. § 1372

The “No Disadvantage” Test

- Take cannot cause a species to fall below OSP
- If applicable, take of depleted species cannot impede progress toward OSP (potential biological removal)

Factors to Consider in Development of Regulations

- Existing and future levels of marine mammal species and population stocks;
- Existing international treaty and agreement obligations of the United States;
- The marine ecosystem and related environmental considerations;
- The conservation, development, and utilization of fishery resources; and
- The economic and technological feasibility of implementation.

16 U.S.C. § 1373(b)

Regulations to Implement or Waiver

Section 103

The Secretary shall prescribe such regulations with respect to the taking and importing of marine mammals, based on --

- Best scientific evidence available
- Consultation with MMC
- *Will not be to disadvantage of the species or stock*
- Consistent with MMPA purposes

Procedures for Development of Regulations

Section 103(d)

- Must be made on the record after opportunity for an agency hearing
- Make available to the public:
 - A statement of estimated levels of the species and population stocks
 - A statement of expected impact of the proposed regulations on the OSP of such species or population stock
 - A statement describing evidence used as basis for proposing the regulation
 - Any studies or recommendations related to the establishment of such regulations
 - Subject to periodic review

16 U.S.C. § 1373(d)

Standards for Permits

Section 104

Permits authorizing the take or importation of a marine mammal may be issued if:

- Consistent with applicable regulations under Section 103, and
- Specify:
 - Number and kind of animals authorized
 - Location and manner of taking
 - Taking must be humane
 - Period where permit is valid
 - Any other terms or conditions

If the reason for the take is overpopulation – is it more desirable to transplant a set number of animals to a location not inhabited by, but previously inhabited by, such species?

16 U.S.C . § 1374(b)

Examples of When the Waiver or Comparable Procedures Have Been Invoked

- The Fur Seal Import Request (1974)
- Tuna/Dolphin Permits prior to the 1984 Amendments (1974, 1976, 1977, 1980, Permit legislated)
- State of Alaska Transfer of Management Request (1976)
- Dall's Porpoise Proceedings- Japanese High Seas Salmon Fishery (1981, 1984 - Permit legislated, 1987)
- Makah Whale Hunt (2005-ongoing)

Significant litigation associated with each administrative proceeding.

Protection of Property

Section 101(a)(4)(A)

Take prohibition does not apply to the use of measures

- By owner to deter a marine mammal for damaging fishing gear or catch
- By owner to deter a marine mammal from damaging private property
- By anyone to deter a marine mammal from ending personal safety
- By government employee to deter a marine mammal from damaging public property
- Measures do not result in death or serious injury of marine mammal

16 U.S.C. § 1371(a)(4)(A)

Taking of Marine Mammals As Part of Official Duties

Section 109(h)

- By government official or designated party
- Taking in the course of official duties
- In a humane manner
- Taking must be for
 - Protection of welfare of the animal
 - Protection of public health and welfare
 - For nonlethal removal of nuisance animals
- Must return the animal to its natural habitat when feasible

16 U.S.C. § 1379(h)

Pinniped Removal Authority Standards

Section 120(a),(b)

Notwithstanding any other provision of MMPA, the Secretary may permit the intentional taking of pinnipeds

- State may apply
- Individually identifiable pinnipeds that are having a significant negative impact or decline or recovery of salmonid stocks that are ESA-listed, approaching that status, or migrated through Ballard Locks
- Cannot be ESA-listed, depleted, or a strategic stock

16 U.S.C. § 1389(a),(b)

Pinniped Removal Authority Procedures

Section 120(c)

- If sufficient evidence, establish Pinniped – Fishery Interaction Task Force
- Public Comment
- Task force to recommend whether to approve application
- Suggest non-lethal alternatives
- If Secretary approves, lethal take carried out by federal or state agencies
- Task forces to study California sea lions, Pacific harbor seals, pinnipeds interacting with aquaculture in Gulf of Maine

General Observations – Waiver Process

- Discussion of waiver process means MMPA has been working, albeit belatedly and without certainty
- Waiver process is challenging, time-consuming, and adversarial
- Litigation is very likely to be involved
- Conservation bias of MMPA will apply
- Waiver should be sought as a last resort