



MARINE MAMMAL COMMISSION

17 May 2013

Deborah Pierce Williams, Supervisor
Marine Mammals Management Office
U.S. Fish and Wildlife Service
1011 East Tudor Road, MS-341
Anchorage, Alaska 99503

Dear Ms. Pierce Williams:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the 1 March 2013 document posted on the Fish and Wildlife Service's Web site requesting public comments on the Service's interpretation of select terms under the Marine Mammal Protection Act as they pertain to the taking of sea otters by Alaska Natives (<http://alaska.fws.gov/fisheries/mmm/current.htm>). Specifically, those terms are (1) "dwells on the coast," (2) "large-scale mass production," and (3) "significantly altered from their natural form." The Marine Mammal Commission provides the following recommendations and rationale.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the Fish and Wildlife Service—

- provide additional legislative background regarding the Native handicraft exception in the final guidance document clarifying the term "significantly altered from their natural form," because understanding the Congressional intent is key to properly delineating what degree of alteration is required to constitute a handicraft;
- discuss the enforcement considerations behind the significantly altered requirement and factor such considerations into its guidance;
- clarify whether those who purchase and legally possess handicraft items may alter them;
- consider whether a broader and more formal clarification (e.g., through the promulgation of regulations) of the term "significantly altered" should be pursued;
- amend the proposed guidance to differentiate more clearly those items that it considers to be significantly altered from those that are not;
- adopt guidance based in part on whether an item can be converted back into something approximating its original form (e.g., a more or less intact hide);
- consider issuing joint guidance or regulations with the National Marine Fisheries Service if there is a need to clarify the meaning of the term "dwells on the coast of the North Pacific Ocean or the Arctic Ocean" as used in section 101(b) of the Act;
- adopt the proposed guidance interpreting the term "large-scale mass production" but, as with other aspects of the guidance, consider broadening the definition to apply to other marine mammal species and codifying this guidance through regulations issued jointly with the National Marine Fisheries Service;

- expand the guidance document to provide clarification on when hunting of sea otters would be considered wasteful;
- publish a notice of availability of the draft in the *Federal Register* and extend the public comment period by an additional 30 to 60 days before finalizing the clarification document.

RATIONALE

Section 101(b) of the Marine Mammal Protection Act authorizes “any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean” to take marine mammals for subsistence purposes or for purposes of creating and selling authentic articles of handicrafts and clothing, provided that, in each case, the taking is not accomplished in a wasteful manner. Section 101(b)(2) includes a definition of what constitutes “authentic native articles of handicrafts and clothing” and provides a partial list of the types of activities considered to be “traditional native handicrafts” (i.e., weaving, carving, stitching, sewing, lacing, beading, drawing, and painting). The Service has provided further interpretation of the Act’s requirements through regulations published at 50 C.F.R. §§ 18.3 and 18.23. Two of the terms that the Service seeks to clarify have their origin in the regulatory definition of the term “authentic native articles of handicrafts and clothing.”

The Service defines “authentic native articles of handicrafts and clothing” to mean—

items made by an Indian, Aleut, or Eskimo that (a) are composed wholly or in some significant respect of natural materials and (b) are significantly altered from their natural form and are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass-copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large-scale mass-production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as cooperatives, is permitted so long as no large-scale mass production results [emphasis added].

To a large extent this definition tracks the wording of the underlying statutory provisions. The key differences are (1) a requirement that such items be significantly altered from their natural form, (2) a clarification that those producing authentic native articles of handicrafts and clothing may use improved methods of production utilizing modern implements such as sewing machines and modern tanning processes, so long as no large-scale mass-production industry results, and (3) a finding that the formation of traditional native groups such as cooperatives is allowed, provided that no large-scale mass-production results.

The Commission believes that these regulatory embellishments are an appropriate exercise of the Service’s regulatory authority under section 112(a) of the Act and are consistent with the legislative intent behind the handicraft exception. The provisions concerning improved production methods and formation of cooperatives are drawn directly from the legislative history of the Act as

originally enacted (see S. REP. NO. 863, 92d Cong., 2d Sess. at 14 (1972)). In contrast, the term “significantly altered” appears nowhere in the pertinent legislative reports. Nevertheless, that requirement is in keeping with the available legislative history.

Significantly altered

In supporting the inclusion of the handicraft exception in the Act, Senator Ted Stevens stated that “[f]or many of the Alaskan Natives, the selling of their handicrafts, fashioned painstakingly and with great skill from ocean mammals is the sole basis of their cash economy.”¹ Later, Senator Stevens noted that “[t]his is an industry of Native manufacture, handicrafts and carving—wonderfully intricate hand-carved bones and tusks, decorated parkas and boats, completely waterproof and ideally suited for the rugged outdoor life lived in that far part of the world.”² Senator Stevens also provided a display of Native handicrafts on loan from the University of Alaska for his colleagues to view as they considered the need for a handicraft exception. That display, he observed, “not only... accurately portray[s] the dependence of my people on these animals, but more importantly, it indicates to all of us the extent of their civilization and their present needs.”³

All of these statements suggest that Congress envisioned authentic native articles of handicrafts or clothing to be an artistic endeavor, requiring significant, skilled, and even intricate workmanship. Merely stitching otherwise unworked skins together, although arguably within the statutory requirements (in that the item is “composed wholly or in some significant respect of natural materials” and is produced by sewing or stitching) falls short of what Congress had in mind in enacting the handicraft exception in that it lacks the requisite skill and degree of workmanship. The regulatory overlay provided by the “significantly altered” requirement thus provides a useful and acceptable means of delineating the extent of work required to convert raw materials into an article of handicraft. The Congressional Record does not provide a list of the items on display in the Senate chamber as it considered the Alaska Native exemption in 1972. If the Service is able to find such a list, it might give the best indication of what types of items and degree of alteration Congress had in mind when it used the term authentic native articles of handicrafts and clothing in the Marine Mammal Protection Act. The Marine Mammal Commission recommends that, in the final guidance document clarifying the term “significantly altered from their natural form,” the Fish and Wildlife Service provide additional legislative background regarding the Native handicraft exception because understanding the Congressional intent is key to properly delineating what degree of alteration is required to constitute a handicraft.

The requirement that marine mammal parts be significantly altered from their natural form also serves an important enforcement function. Congress considered and rejected a broader exemption that would have allowed Alaska Natives to trade in raw, unworked marine mammal parts. Similarly, Congress limited the opportunities for non-Natives to take marine mammals and gain access to marine mammal parts, establishing a rigorous waiver process for such authorizations. It would therefore be inconsistent with Congressional intent if non-Natives could easily acquire unaltered or minimally worked marine mammal parts as handicrafts that then could easily be

¹ Congressional Record, July 25 1972 at S.25259.

² Id. at S.25260.

³ Id. at S25258.

converted back to, or near to, their raw form. Enforcement considerations are relevant factors in determining whether a marine mammal or marine mammal part has been sufficiently altered from its natural form to prevent reversion to, or near to, a raw product from which other items could be fashioned. In the case of sea otters, for example, a very skillful and artistic painting could be made on the back of a whole pelt. Clearly, such an item is made wholly or in some significant part from natural materials. Likewise, its method of manufacture (painting) is one of the traditional native handicrafts specified in section 101(b)(2) of the Marine Mammal Protection Act. Nevertheless, it should not be considered to be significantly altered, because it is, in essence, a whole pelt that could be used by a non-Native to make other items merely by turning it over. Although perhaps difficult to implement, one possible test in allowing such items to be marketed is whether the intact handicraft item is worth considerably more than the raw materials from which that particular item is made. The Marine Mammal Commission recommends that in the final guidance document clarifying the term “significantly altered from their natural form” the Fish and Wildlife Service discuss the enforcement considerations behind the significantly altered requirement and factor such considerations into its guidance.

Enforcement considerations apply not only to those making and selling authentic native articles of handicrafts and clothing, but to those who purchase them. In this regard, the Marine Mammal Commission recommends that the Fish and Wildlife Service discuss what those who purchase and legally possess such items may do with them. May they convert them into something else or is possession legal only so long as the handicraft is unaltered? The answer hinges largely on the Service’s interpretation of section 102(a)(3) of the Act, which prohibits any person from possessing a marine mammal or any product from a marine mammal that was taken in violation of the Act. Specifically, does possession of an altered handicraft remain legal because the initial taking to create the handicraft was legal, or does it become illegal because the legality of the underlying taking is dependent on continued use of the mammal or its parts for handicraft purposes? If the Service believes that it is illegal for someone to use the marine mammal parts contained in authentic native articles of handicrafts and clothing to create some other product, this presents a second enforcement opportunity against those who might exploit the handicraft exception to acquire marine mammal parts for unauthorized purposes. To the extent that there is this second chance to enforce the Act to ensure that the handicraft exception is not abused, then more leeway might be afforded at the creation step, figuring that the Service could take action against those who seek to convert handicrafts into other products.

Although the Service might be able to enforce the Act against those who alter or convert handicrafts and who are subject to U.S. jurisdiction, it has little recourse against those who might do so in other countries. Thus, the Service should consider its enforcement opportunities for handicrafts that are exported in determining how significant the alteration of a sea otter must be to qualify as authentic native articles of handicrafts and clothing. Sea otters are listed on Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). As such, export permits must be obtained unless the items fit within the CITES personal and household effects exceptions. It does not seem likely that commercial quantities of sea otter products could be exported without a permit or permits being issued. If it appears that sea otter handicrafts are being exported in ways or in quantities that may raise concerns, the Service might have certain remedies. First, before issuing a permit, the Service would need to make a non-

detriment finding. That is, it would need to determine that the level of taking does not pose risks to the survival of sea otter stocks.

In the case of handicrafts, the Service might have further latitude to control exports if it detects a problem with how items are being used after they are exported. The 1994 amendments to the Marine Mammal Protection Act added a prohibition on exporting any marine mammal or marine mammal product that is taken in violation of the Act or for any purpose other than public display, scientific research, or enhancing the survival of a species or stock, except as provided in section 101 or other listed sections of the Act. Section 101(b), crafted well before enactment of the 1994 amendments, is silent on the question of whether exports of authentic native articles of handicrafts and clothing are authorized. Although the Service has issued a policy statement interpreting the provision as authorizing exports, this is not explicit in the statute and could be amended by the agency.

The Commission supports the Service's efforts to clarify what constitutes sufficient transformation of marine mammal parts to comport with the significantly altered requirement of its regulations. Although the need for such clarification may be most acute with respect to items made from sea otters, more general guidance applicable to other marine mammals (e.g., walrus and polar bears) utilized by Alaska Natives also would be helpful. Further in this regard, the National Marine Fisheries Service, which is responsible for conserving and managing other marine mammal species, has adopted a similar definition of what qualifies as "authentic native articles of handicrafts and clothing" (50 C.F.R. § 216.3). Although handicraft traditions and the parts and processes used to fashion handicrafts may vary depending on the species, the basic guidance on what constitutes significant alteration should be consistent among species and across the two agencies. The Marine Mammal Commission therefore recommends that the Fish and Wildlife Service and the National Marine Fisheries Service consider whether a broader and more formal clarification (e.g., through the promulgation of regulations) of the term "significantly altered" should be pursued. As an interim measure, the Commission believes that providing guidance specific to sea otters—as the Service has proposed—is a good first step.

In its proposed guidance the Service proposes to clarify the term "significantly altered" by explaining that hides must be "substantially changed." The Commission recognizes the difficulty in crafting guidance that clearly delineates the dividing line between items made from marine mammal parts that have been significantly altered from their natural form and those that have not. At the extremes, the differentiation is straightforward. Clearly, sea otter hides that have been transformed into mittens, hats, mukluks, or purses meet the test. Likewise, items fashioned from whole pelts with only minimal stitching that "can be easily converted back to an unaltered piece of hide" do not. It is for items in the middle ground that guidance is most needed and for which the clarification proposed by the Service falls short. However, without further clarification, the replacement of one ambiguous term ("significantly altered") with another equivalent, but equally ambiguous term ("substantially changed") does little to resolve the issue.

The Commission also questions some of the examples provided in the Service's draft guidance. One of the tests proposed by the Service is whether items can be easily converted back into an unaltered hide. The Commission agrees that this is an appropriate standard, which among other things serves an important enforcement function. Some of the examples given for items that

have been significantly altered, however, do not appear to meet this test. For example, our understanding is that a “neck roll” is basically a blocked hide that is rolled into a cylinder and held together with stitching at the margins. It can be converted back into an unaltered hide merely by removing the stitching and unrolling it. Similarly, placement of blankets in both the significantly altered and not significantly altered categories is confusing. Is it the number of stitches used to hold the hides together or the application of a lining that makes the difference? In both cases, the hides can be separated (albeit with a bit more work if there are more stitches) and any backing removed, so that one is left with largely unaltered hides in either case. Consistent with the discussion above, the Marine Mammal Commission recommends that the Fish and Wildlife Service amend the proposed guidance to differentiate more clearly those items that it considers to be significantly altered from those that are not. The Marine Mammal Commission further recommends that the Service base its guidance, in part, on whether the item can be converted back into something approximating its original form (e.g., a more or less intact hide). This is not to say that such items cannot be made and used by Alaska Natives for subsistence purposes, only that they could not be sold to non-Natives as authentic native articles of handicrafts and clothing.

Dwells on the coast

The Commission does not think that basic interpretations of generally applicable terms used in the Marine Mammal Protection Act should vary by species or between the two agencies with regulatory authority to carry out the Act. Consistent with this view, the Commission has some concern that the Fish and Wildlife Service is proposing guidance on what the term “dwells on the coast” means specific to sea otters. Based on that concern, the Marine Mammal Commission recommends that the Fish and Wildlife Service consider issuing joint guidance or regulations with the National Marine Fisheries Service if it has a need to clarify the meaning of the term “dwells on the coast of the North Pacific Ocean or the Arctic Ocean,” as used in section 101(b) of the Act.

Having said this, the guidance proposed by the Service seems appropriate for sea otters and many other marine mammal species. The Commission’s interpretation of the proposed clarification is that it would apply not only to those Natives living along coastal areas but also to those further inland that may encounter marine mammals (e.g., at Lake Iliamna, which has a population of harbor seals). The Commission is concerned, however, that the proposed definition may not include the full scope of Alaska Natives that traditionally use marine mammals for subsistence and/or handicraft purposes. For example, Nuiqsut—one of the Native villages that participates in the bowhead whale hunt—is about 35 miles inland from the Beaufort Sea waters where hunting occurs. It is unclear how close to the coast one must dwell to be considered living “adjacent to waters that are tidally influenced.” This should be clarified and, if need be, the proposed definition expanded to encompass the full suite of Alaska Natives who hunt marine mammals traditionally.

Large-scale mass production

The guidance provided by the Service to clarify this term seems appropriate and provides additional, useful examples on what it considers to be prohibited mass copying devices. The Marine Mammal Commission recommends that the Fish and Wildlife Service adopt the proposed guidance interpreting the term “large-scale mass production” but, as with other aspects of the guidance, consider broadening the definition to apply to other marine mammal species. Because this is a

generally applicable term under the Act, the Service should consider codifying this guidance through regulations issued jointly with the National Marine Fisheries Service.

Wasteful taking

Except for a passing mention that “some parties are concerned that the take of sea otters will increase if our clarification of the term ‘significantly altered’ is perceived as being more permissive,” little context about the controversy surrounding sea otters in Southeast Alaska is provided in the draft guidance document. The Commission agrees with the Service’s assessment that the proposed clarification in these terms “is not the appropriate tool to use to manage [the] harvest of sea otter populations.” Nevertheless, the Commission is concerned about statements that some Natives anticipate increasing their hunting of sea otters based on what they expect to be more permissive guidance. The Marine Mammal Protection Act does not place a numerical limit on the allowable take of marine mammals for subsistence or for creating and selling authentic native articles of handicrafts and clothing and the Service may establish them only if the affected stock is determined to be depleted and such limits are established through formal rulemaking. At the same time, the Service should do all that it can to ensure that any sea otter taken is used for a legitimate subsistence or handicraft purpose. This may be difficult at times, because a hunter’s motive in taking an otter (subsistence/handicraft use versus reducing fisheries conflicts) may be difficult to discern.

In this regard, the guidance offered by the district court in *Didrickson v. U.S. Department of the Interior*, 796 F. Supp. 1281 (D. Alaska 1991), is instructive. The court concluded that—

This opinion should not be construed as authorizing a “free-for-all” killing of hundreds of sea otters. All that has been said is that the Secretary of Interior, through the FWS, does not have the authority to *regulate* the harvesting of sea otters for purposes of creating native handicrafts absent a finding of depletion. This does not mean the FWS has somehow lost its enforcement powers, particularly with regard to the requirement that the takings not be wasteful. Moreover, a particular article must still satisfy the statutory definition of “authentic.”

The Service’s guidance is focused entirely on the question of whether an article meets the definition of authentic. It does not describe when a taking would be considered wasteful. Clearly, failure to use all the usable parts of an animal would raise concerns. However, it would be useful if the Service were to provide guidance as to whether limiting use of a sea otter to its pelt alone would be considered a wasteful practice. Additional guidance also should be provided as to when overall hunting would be considered wasteful. Specifically, in the handicraft realm, to what extent is wasteful taking governed by what Native artisans can produce as opposed to what the market will absorb? On a related point, to what extent are Native hunters allowed to stockpile raw materials for eventual conversion into authentic native articles of handicrafts and clothing without running afoul of the wasteful taking limitation? In light of these unresolved questions, and the possibility that the taking of sea otters might be driven by motives other than subsistence need or the desire to create and sell authentic native articles of handicrafts and clothing, the Marine Mammal Commission recommends that the Fish and Wildlife Service also provide clarification on when hunting of sea otters would be considered wasteful.

Procedural considerations

From the outset, the Fish and Wildlife Service has indicated that the proposed clarifications of its regulations as they pertain to authentic native articles of handicrafts and clothing made from sea otters provide non-binding guidance only. As such, these clarifications do not require rulemaking. Further, the Service believes that it could have issued this guidance without any public notice and comment process at all. Nevertheless, the Service decided to solicit comments from interested parties by posting the draft clarification document on the regional office's Web site and by providing actual notice to the Alaska Congressional delegation, selected agencies, affected Tribes, and various organizations, either via e-mail or telephone. Despite suggestions that it do so from the Commission's staff and others, the Service thus far has declined to publish a broader notice and solicitation of comments in the *Federal Register*.

As reflected in its other comments, the Commission believes that several issues raised in the draft clarification document have relevance and applicability beyond sea otters. The terms for which clarification is proposed are generally applicable to all authentic native articles of handicrafts and clothing made from marine mammals by Alaska Natives and to species under the jurisdiction of both the Fish and Wildlife Service and the National Marine Fisheries Service. For these reasons, it would be beneficial if the two agencies issued joint guidance interpreting the terms "significantly altered from their natural form," "dwells on the coast," and "large-scale mass production." As indicated above, notice and comment rulemaking, or at least the issuance of a joint policy statement applicable to all marine mammal species taken for purposes of creating and selling authentic native articles of handicrafts and clothing would be appropriate.

In making these recommendations, the Commission recognizes that the parts and processes used to make authentic native articles of handicrafts and clothing vary considerably among species. The types of items made from sea otter fur are quite different from those made from walrus ivory or bowhead whale baleen. Despite this, there should be some common principles that apply when determining whether raw marine mammal parts have been altered sufficiently to qualify as authentic native articles of handicrafts and clothing. Such broadly applicable guidance should be provided before trying to particularize that guidance to specific species or handicraft techniques.

The Commission supports the Service's decision to seek input from interested parties and the public before adopting the proposed clarifications. However, we are concerned about the limited notice and distribution of the proposal. Although circulated to targeted constituencies and posted on the region's Website, the Service made no general announcement of the availability of the proposed policy and did not solicit comment in the more usual way (e.g., through publication in the *Federal Register*). Thus, not everyone who has interest in these issues or who may want to comment may have been apprised of that opportunity. Without getting into whether and, if so, what sort of public notice and comment opportunity is legally required or appropriate, the Commission believes that, from a policy perspective, the Service should conduct a process that is as inclusive and transparent as possible. Such a process would be in keeping with the applicable open government initiatives and directives. For these reasons, the Marine Mammal Commission recommends that the Fish and Wildlife Service, before finalizing the clarification document, publish a notice of availability of the draft in the *Federal Register* and extend the public comment period by an additional 30 to 60 days.

Ms. D. Pierce Williams
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Please let me know if you have any questions regarding these comments and recommendation or whether you would like to discuss them further with the Commission staff.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a long horizontal line extending from the start of the name.

Timothy J. Ragen, Ph.D.
Executive Director

cc: Daniel M. Ashe, Director, U.S. Fish and Wildlife Service
Michael J. Bean, Counselor to the Assistant Secretary for Fish and Wildlife and Parks
Donna Wieting, Director, Office of Protected Resources, National Marine Fisheries Service
Jon Kurland, Director, Protected Resources Division, National Marine Fisheries Service,
Alaska Region