Public Law 97-58
97th Congress

An Act

To improve the operation of the Marine Mammal Protection Act of 1972, and for other purposes.

Oct. 9, 1981
[H.R. 4084]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Marine Mammal Protection Act of 1972, amendment.

SECTION 1. OPTIMUM SUSTAINABLE POPULATION.

(a) BASIC AMENDMENT.—Paragraph (8) of section 3 of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362(8)) (which Act shall hereafter in this Act be referred to as the "Act of 1972") is repealed.

(b) CONFORMING AMENDMENTS.—(1) Section 2(6) of the Act of 1972 (16 U.S.C. 1361(6)) is amended by striking out "optimum carrying capacity" and inserting in lieu thereof "carrying capacity".

(2) Section 3 of the Act of 1972 (16 U.S.C. 1362) is further amended—

(A) by amending paragraph (1) to read as follows:

"(1) The term 'depletion' or 'depleted' means any case in which— "Depletion" or "depleted."

"(A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under title II of this Act, determines that a species or population stock is below its optimum sustainable population; 16 USC 1401.

"(B) a State, to which authority for the conservation and management of a species or population stock is transferred under section 109, determines that such species or stock is below its optimum sustainable population; or *Post*, p. 982.

"(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973."; 16 USC 1531 note.

(B) by striking out "the optimum carrying capacity of their habitat" in paragraph (2) and inserting in lieu thereof "their optimum sustainable population";

(C) by redesignating paragraphs (9) through (15) as paragraphs (8) through (14), respectively;

(D) by striking out "optimum carrying capacity" in paragraph (8) (as so redesignated) and inserting in lieu thereof "carrying capacity"; and

(E) by amending paragraph (13) (as so redesignated) to read as follows:

"(13) The term 'United States' includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, American Samoa, Guam, and Northern Mariana Islands.". "United States."

SEC. 2. MORATORIUM ON TAKING AND IMPORTING MARINE MAMMALS.

Section 101 of the Act of 1972 (16 U.S.C. 1371) is amended—

(1) by amending subsection (a)—

(A) by striking out the first four sentences of paragraph (2) and inserting in lieu thereof the following: "(2) Marine mammals may be taken incidentally in the course of com-

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16 USC 1374.
16 USC 1373.

mercial fishing operations and permits may be issued therefor under section 104 subject to regulations prescribed by the Secretary in accordance with section 103. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.",

(B) by striking out "is classified as belonging to an endangered species or threatened species pursuant to the Endangered Species Act of 1973 or" in paragraph (3)(B), and

16 USC 1531 note.

(C) by adding at the end thereof the following new paragraphs:

"(4)(A) During any period of five consecutive years, the Secretary shall allow the incidental, but not the intentional, taking, by citizens of the United States while engaging in commercial fishing operations, of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice and opportunity for public comment—

"(i) finds that the total of such taking during such five-year period will have a negligible impact on such species or stock; and

"(ii) provides guidelines pertaining to the establishment of a cooperative system among the fishermen involved for the monitoring of such taking.

"(B) The Secretary shall withdraw, or suspend for a time certain, the permission to take marine mammals under subparagraph (A) if the Secretary finds, after notice and opportunity for public comment, that—

"(i) the taking allowed under subparagraph (A) is having more than a negligible impact on the species or stock concerned; or

"(ii) the policies, purposes and goals of this Act would be better served through the application of this title without regard to this subsection.

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

Notice, publication in Federal Register.

"(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 that is not depleted 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 comment—

"(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 its habitat, and on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) or section 109(f); and

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"(ii) prescribes regulations setting forth—

"(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

"(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), that—

"(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.

Emergency situation.

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

16 USC 1373, 1374.

(2) by amending subsection (b)—

(A) by amending the matter preceding paragraph (1) to read as follows: "Except as provided in section 109, the provisions of this Act shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—", and

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(B) by amending paragraph (1) to read as follows:

"(1) is for subsistence purposes; or".

SEC. 3. PROHIBITIONS AND PENALTIES.

(a) PROHIBITIONS.—(1) Section 102(a) of the Act of 1972 (16 U.S.C. 1372(a)) is amended—

(A) by inserting "109," immediately after "104," in the matter preceding paragraph (1);

(B) by redesignating paragraph (4) as paragraph (5); and

(C) by striking out paragraph (3) and inserting in lieu thereof the following:

"(3) for any person, with respect to any marine mammal taken in violation of this title, to possess that mammal or any product from that mammal;

"(4) for any person to transport, purchase, sell, or offer to purchase or sell any marine mammal or marine mammal product; and".

(2) Section 102(b)(3) of such Act is amended by striking out "or which has been listed as an endangered species or threatened species pursuant to the Endangered Species Act of 1973".

16 USC 1531 note.

(3) Section 102(d)(1) of such Act is amended by striking out "or endangered".

(b) PENALTIES.—Section 105(a) of the Act of 1972 (16 U.S.C. 1375(a)) is amended by inserting "(1)" immediately after "(a)" and by inserting at the end thereof the following new paragraph:

"(2) In any case involving an alleged unlawful importation of a marine mammal or marine mammal product, if such importation is made by an individual for his own personal or family use (which does not include importation as an accommodation to others or for sale or other commercial use), the Secretary may, in lieu of instituting a proceeding under paragraph (1), allow the individual to abandon the mammal or product, under procedures to be prescribed by the Secretary, to the enforcement officer at the port of entry.".

SEC. 4. STATE MANAGEMENT.

(a) TRANSFER OF MANAGEMENT AUTHORITY.—Section 109 of the Act of 1972 (16 U.S.C. 1379) is amended—

(1) by redesignating subsections (c) and (d) as subsections (k) and (l), respectively; and

(2) by striking out subsections (a) and (b) and inserting in lieu thereof the following:

"SEC. 109. (a) No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as 'management authority') to the State under subsection (b)(1).

State conservation and management programs.

"(b)(1) Subject to paragraph (2) and subsection (f), the Secretary shall transfer management authority for a species of marine mammal to a State if the Secretary finds, after notice and opportunity for public comment, that the State has developed and will implement a program for the conservation and management of the species that—

"(A) is consistent with the purposes, policies, and goals of this Act and with international treaty obligations;

"(B) requires that all taking of the species be humane;

"(C) does not permit the taking of the species unless and until—

"(i) the State has determined, under a process consistent with the standards set forth in subsection (c)—

"(I) that the species is at its optimum sustainable population (hereinafter in this section referred to as 'OSP'), and

"(II) the maximum number of animals of that species that may be taken without reducing the species below its OSP, and

"(ii) the determination required under clause (i) is final and implemented under State law, and, if a cooperative allocation agreement for the species is required under subsection (d)(1), such an agreement is implemented;

"(D) does not permit the taking of a number of animals of the species that exceeds the maximum number determined pursuant to subparagraph (C)(i)(II), and, in the case of taking for subsistence uses (as defined in subsection (f)(2)), does not permit the taking of a number of animals that would be inconsistent with the maintenance of the species at its OSP;

"(E) does not permit the taking of the species for scientific research and public display purposes, except for taking for such purposes that is undertaken by, or on behalf of, the State;

"(F) provides procedures for acquiring data, and evaluating such data and other new evidence, relating to the OSP of the species, and the maximum take that would maintain the species at that level, and, if required on the basis of such evaluation, for amending determinations under subparagraph (C)(i);

"(G) provides procedures for the resolution of differences between the State and the Secretary that might arise during the development of a cooperative allocation agreement under subsection (d)(1); and

"(H) provides for the submission of an annual report to the Secretary regarding the administration of the program during the reporting period.

"(2) During the period between the transfer of management authority for a species to a State under paragraph (1) and the time at which the implementation requirements under paragraph (1)(C)(ii) are complied with—

"(A) the State program shall not apply with respect to the taking of the species within the State for any purpose, or under any condition, provided for under section 101; and

16 USC 1371.

"(B) the Secretary shall continue to regulate, under this title, all takings of the species within the State.

"(3) After the determination required under paragraph (1)(C)(i) regarding a species is final and implemented under State law and after a cooperative allocation agreement described in subsection (d)(1), if required, is implemented for such species—

"(A) such determination shall be treated, for purposes of applying this title beyond the territory of the State, as a determination made in accordance with section 103 and as an applicable waiver under section 101(a)(3);

16 USC 1373.

"(B) the Secretary shall regulate, without regard to this section other than the allocations specified under such an agreement, the taking of the species—

"(i) incidentally in the course of commercial fishing operations (whether provided for under section 101(a) (2) or (4)), or in the course of other specified activities provided for under section 101(a)(5), in the zone described in section 3(14)(B), and

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"(ii) for scientific research or public display purposes (other than by, or on behalf of, the State), except that any taking authorized under a permit issued pursuant to section 101(a)(1) after the date of the enactment of the 1981 amendment to this subsection allowing the removal of live animals from habitat within the State shall not be effective if the State agency disapproves, on or before the date of issuance of the permit, such taking as being inconsistent with the State program; and

"(C) section 101(b) shall not apply.

"(c) The State process required under subsection (b)(1)(C) must comply with the following standards:

Compliance standards.

"(1) The State agency with management authority for the species (hereinafter in this section referred to as the 'State agency') must make an initial determination regarding the factors described in clause (i) of that subsection. The State agency must identify, and make available to the public under reasonable circumstances, the documentation supporting such initial determination. Unless request for a hearing under paragraph (2) regarding the initial determination is timely made, the initial determination shall be treated as final under State law.

Hearing.

"(2) The State agency shall provide opportunity, at the request of any interested party, for a hearing with respect to the initial determination made by it under paragraph (1) at which interested parties may—

"(A) present oral and written evidence in support of or against such determination; and

"(B) cross-examine persons presenting evidence at the hearing.

Public notice.

The State agency must give public notice of the hearing and make available to the public within a reasonable time before commencing the hearing a list of the witnesses for the State and a general description of the documentation and other evidence that will be relied upon by such witnesses.

"(3) The State agency, solely on the basis of the record developed at a hearing held pursuant to paragraph (2), must make a decision regarding its initial determination under paragraph (1) and shall include with the record a statement of the findings and conclusions, and the reason or basis therefor, on all material issues.

Judicial review.

"(4) Opportunity for judicial review of the decision made by the State agency on the record under paragraph (3), under scope of review equivalent to that provided for in section 706(2) (A) through (E) of title 5, United States Code, must be available under State law. The Secretary may not initiate judicial review of any such decision.

Cooperative allocation agreement.

"(d)(1) If the range of a species with respect to which a determination under paragraph (1)(C)(i) of subsection (b) is made extends beyond the territorial waters of the State, the State agency and the Secretary (who shall first coordinate with the Marine Mammal Commission and the appropriate Regional Fishery Management Council established under section 302 of the Act of April 13, 1976 (16 U.S.C. 1852)) shall enter into a cooperative allocation agreement providing procedures for allocating, on a timely basis, such of the number of animals, as determined under paragraph (1)(C)(i)(II) of subsection (b), as may be appropriate with priority of allocation being given firstly to taking for subsistence uses in the case of the State of Alaska, and secondly to taking for purposes provided for under section 101(a) within the zone described in section 3(14)(B).

16 USC 1371.
Ante, p. 979.

"(2) If the State agency requests the Secretary to regulate the taking of a species to which paragraph (1) applies within the zone described in section 3(14)(B) for subsistence uses or for hunting, or both, in a manner consistent with the regulation by the State agency of such taking within the State, the Secretary shall adopt, and enforce within such zone, such of the State agency's regulatory provisions as the Secretary considers to be consistent with his administration of section 101(a) within such zone. The Secretary shall adopt such provisions through the issuance of regulations under section 553 of title 5, United States Code, and with respect to such issuance the Regulatory Flexibility Act, the Paperwork Reduction Act, Executive Order Numbered 12291, dated February 17, 1981, and the thirty-day notice requirement in subsection (d) of such section 553 shall not apply. For purposes of sections 105, 106, and 107, such regulations shall be treated as having been issued under this title.

Regulations.

5 USC 601 note.
44 USC 101 note.
46 FR 13193.

16 USC 1375-1377.

Revocation of authority transfer.

"(e)(1) Subject to paragraph (2), the Secretary shall revoke, after opportunity for a hearing, any transfer of management authority made to a State under subsection (b)(1) if the Secretary finds that the State program for the conservation and management of the species concerned is not being implemented, or is being implemented in a

manner inconsistent with the provisions of this section or the provisions of the program. The Secretary shall also establish a procedure for the voluntary return by a State to the Secretary of species management authority that was previously transferred to the State under subsection (b)(1).

Revocation conditions.

"(2)(A) The Secretary may not revoke a transfer of management authority under paragraph (1) unless—

"(i) the Secretary provides to the State a written notice of intent to revoke together with a statement, in detail, of those actions, or failures to act, on which such intent is based; and

"(ii) during the ninety-day period after the date of the notice of intent to revoke—

"(I) the Secretary provides opportunity for consultation between him and the State concerning such State actions or failures to act and the remedial measures that should be taken by the State, and

"(II) the State does not take such remedial measures as are necessary, in the judgment of the Secretary, to bring its conservation and management program, or the administration or enforcement of the program, into compliance with the provisions of this section.

"(B) When a revocation by the Secretary of a transfer of management authority to a State becomes final, or the State voluntarily returns management authority to the Secretary, the Secretary shall regulate the taking, and provide for the conservation and management, of the species within the State in accordance with the provisions of this Act (and in the case of Alaskan Natives, section 101(b) and subsection (i) of this section shall apply upon such revocation or return of management authority).

Ante, p. 981.

Authority transfer to State of Alaska, restrictions.

"(f)(1) The Secretary may not transfer management authority to the State of Alaska under subsection (b)(1) for any species of marine mammal unless—

"(A) the State has adopted and will implement a statute and regulations that insure that the taking of the species for subsistence uses—

"(i) is accomplished in a nonwasteful manner,

"(ii) will be the priority consumptive use of the species, and

"(iii) if required to be restricted, such restriction will be based upon—

"(I) the customary and direct dependence upon the species as the mainstay of livelihood,

"(II) local residency, and

"(III) the availability of alternative resources; and

"(B) the State has adopted a statute or regulation that requires that any consumptive use of marine mammal species, other than for subsistence uses, will be authorized during a regulatory year only if the appropriate agency first makes findings, based on an administrative record before it, that—

"(i) such use will have no significant adverse impact upon subsistence uses of the species, and

"(ii) the regulation of such use, including, but not limited to, licensing of marine mammal hunting guides and the assignment of guiding areas, will, to the maximum extent practicable, provide economic opportunities for the residents of the rural coastal villages of Alaska who engage in subsistence uses of that species.

Definitions.

"(2) For purposes of paragraph (1), the term 'subsistence uses' means the customary and traditional uses by rural Alaska residents of marine mammals for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of marine mammals taken for personal or family consumption; and for barter, or sharing for personal or family consumption. As used in this paragraph—

"(A) The term 'family' means all persons related by blood, marriage, or adoption, or any person living within a household on a permanent basis.

"(B) The term 'barter' means the exchange of marine mammals or their parts, taken for subsistence uses—

"(i) for other wildlife or fish or their parts, or

"(ii) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

"(g) Neither the transfer of management authority to a State under subsection (b)(1), nor the revocation or voluntary return of such authority under subsection (e), shall be deemed to be an action for which an environmental impact statement is required under section 102 of the National Environmental Policy Act of 1969.

42 USC 4332.

"(h) Nothing in this title 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 duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for—

16 USC 1382.

"(1) the protection or welfare of the mammal,

"(2) the protection of the public health and welfare, or

"(3) the nonlethal removal of nuisance animals,

and, in any case in which the return of the mammal to its natural habitat is feasible, includes steps designed to achieve that result.

"(i) The Secretary may (after providing notice thereof in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the affected area and providing opportunity for a hearing thereon in such area) prescribe regulations requiring the marking, tagging, and reporting of animals taken pursuant to section 101(b).

16 USC 1371.

Grants.

"(j) The Secretary may make grants to States to assist them—

"(1) in developing programs, to be submitted for approval under subsection (b), for the conservation and management of species of marine mammals; and

"(2) in administering such programs if management authority for such species is transferred to the State under such subsection.

Grants made under this subsection may not exceed 50 per centum of the costs of developing a State program before Secretarial approval, or of administering the program thereafter.".

16 USC 1379 note.

(b) No Effect on Certain Cooperative Agreements.—Nothing in the amendments made by subsection (a) shall be construed as affecting in any manner, or to any extent, any cooperative agreement entered into by a State under section 6(c) of the Endangered Species Act of 1973 (16 U.S.C. 1535(c)) before, on, or after the date of the enactment of this Act.

SEC. 5. MARINE MAMMAL RESEARCH.

Section 110(a) of the Act of 1972 (16 U.S.C. 1380(a)) is amended by adding at the end thereof the following new sentences: "In carrying out this subsection, the Secretary shall undertake a program of, and shall provide financial assistance for, research into new methods of

locating and catching yellowfin tuna without the incidental taking of marine mammals. The Secretary shall include a description of the annual results of research carried out under this section in the report required under section 103(f).". 16 USC 1373.

SEC. 6. MARINE MAMMAL COMMISSION.

Title II of the Act of 1972 (16 U.S.C. 1401-1407) is amended—

(1) by striking out "furnish its reports and recommendations to him, before publication, for his comment." in section 202(b) and inserting in lieu thereof "provide each annual report required under section 204, before submission to Congress, to the Secretary for comment."; and 16 USC 1402.

(2) by inserting ", or provide such grants to," immediately after "agreements with" in section 206(3). 16 USC 1406.

SEC. 7. AUTHORIZATION OF APPROPRIATIONS.

(a) DEPARTMENT OF COMMERCE.—There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out such functions and responsibilities as it may have been given under title I of the Marine Mammal Protection Act of 1972, $7,223,000 for fiscal year 1982, $8,000,000 for fiscal year 1983, and $8,800,000 for fiscal year 1984. 16 USC 1384. 16 USC 1371.

(b) DEPARTMENT OF THE INTERIOR.—There are authorized to be appropriated to the Department of the Interior, for purposes of carrying out such functions and responsibilities as it may have been given under such title I, $1,600,000 for fiscal year 1982, $1,760,000 for fiscal year 1983, and $2,000,000 for fiscal year 1984. 16 USC 1384.

(c) MARINE MAMMAL COMMISSION.—There are authorized to be appropriated to the Marine Mammal Commission, for purposes of carrying out title II of such Act of 1972, $672,000 for fiscal year 1982, $1,000,000 for fiscal year 1983, and $1,100,000 for fiscal year 1984. 16 USC 1407. 16 USC 1401.

Approved October 9, 1981.

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