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THE NEXT STEP IN NORTH ATLANTIC WHALE PROTECTION: A CLOSER LOOK AT WHALE-WATCH GUIDELINES FOR THE NORTHEAST

Carrie B. Bridgewater*

I. INTRODUCTION

"All whales, dolphins, and porpoises in the northeast region are federally protected by the Marine Mammal Protection Act (MMPA) and most . . . are further protected under the Endangered Species Act (ESA)." The fin, humpback, and northern right whales are all listed as endangered species, with the right whale population at less than 300 individuals. The fin, humpback, northern right, and minke whales are great whales common to the northeast region and Stellwagen Bank National Marine Sanctuary. Under the MMPA and the ESA, it is unlawful to "harass, hunt, capture, or kill" any of these marine mammals.

Whale-watching is a popular recreational activity in the Stellwagen Bank National Marine Sanctuary, and throughout the Northeast Region. Watch vessels seek out the areas most highly populated with whales.

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5. WHALEWATCHING GUIDELINES, supra note 3.
8. Id.
Consequently, this has lead to an increase in the potential for whale harassment and injury. Over the past few years, NMFS has received complaints from the public accusing whale-watching, fishing, and pleasure craft vessels of harassing and injuring whales. Specifically, in 1997, a private citizen reported being aboard a whale-watching vessel when it hit a whale. Furthermore, in 1998, a whale-watching vessel struck two whales while returning to port. While there were no reported whale ship strikes by vessels engaged in whale-watching in 1999, there were three reports of harassment. This has led to voiced trepidation from those concerned with the whale-watching industry.

II. LEGAL BACKGROUND FOR WHALE-WATCH GUIDELINES

A. The Marine Mammal Protection Act of 1972

In 1972, Congress reacted to demanding calls for action from members of the scientific and conservation communities who believed that mammals inhabiting the world's oceans were at serious risk. By enacting the MMPA, Congress achieved one of the first comprehensive federal programs to address an entire class of wildlife. The law Congress passed reflected various viewpoints on the meaningfulness of marine mammals and their purpose in the environment. Through years of litigation and amendments, the goals of the MMPA have expanded to include not only regulating domestic activities affecting marine mammals, but also exercising authority on practices throughout the world.

Congress found that when any species of marine mammal is in danger of extinction it should not be permitted to "diminish beyond the point at which [it] cease[s] to be a significant functioning element in the ecosystem of which [it] is a part, and, consistent with this major objective, [it] should not be permitted to diminish below [its] optimum sustainable population (OSP)." The term OSP is defined in the MMPA as "the number of

9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id. at 270.
16. Id.
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."18 One of the reasons Congress enacted the MMPA was to ensure that immediate measures would be taken to "replenish any marine mammal species that has already diminished below the OSP."19

Congress also found that marine mammals were proven resources, greatly significant in matters concerning international issues. Moreover, these animals hold an aesthetic and recreational significance as well. Congress was mindful that these mammals need management, and that the primary objective of their management should be the provision of an ecosystem that is healthy and stable. A fundamental principle of preservation is reflected in the MMPA's provision for a permanent moratorium on the taking and importation of marine mammals into the United States. According to the MMPA, it is permissible to take marine mammals incidentally in the course of commercial fishing operations. Under the provisions of the Act, it is the Secretary of Commerce's duty to issue permits for the incidental takings of cetaceans in the course of commercial fishing.

Congress ultimately enacted the MMPA to protect marine mammals from the adverse effects of human activities. The MMPA describes both civil and criminal penalties for "taking" a marine mammal in the United States waters, but the criminal penalties apply only to persons who knowingly violate any provision of the MMPA. The MMPA defines take as "harass, hunt, capture, or kill or attempt to harass, hunt, capture, or kill any

18. Id. § 1362(9).
19. Id. § 1361(2).
20. Id. § 1361(6).
21. Id.
22. Id.
25. Id. Permits may be issued by the Secretary and must "specify the number and kind of animals which will be taken, the location and manner in which they will be taken, the period during which the permit is valid, and any other terms or conditions the Secretary deems appropriate." 16 U.S.C. § 1374(b)(2); see also Am. Tunaboat Ass'n v. Brown, 67 F.3d 1404, 1406 (9th Cir. 1995); Comm. for Human Legislation, Inc., v. Richardson, 540 F.2d 1141, 1144 (D.C. Cir. 1976).
29. Id.; see also United States v. Hayashi, 22 F.3d 859, 861 (9th Cir. 1992).
In the past, harassment has been interpreted under the MMPA to involve a sustained, direct, and significant intrusion, which also conforms with "a common understanding of the term 'take,' of which 'harass' is simply one form." To "take" marine mammal prompts a serious and sustained "diversion of the mammal from its natural routine." In essence, it has been suggested that only sustained and serious disruptions of normal mammal behavior fall under the term "harass." However, regulations proposed in 1998 by NMFS adopted a new definition for the term "harm," within the MMPA's definition of "take," more in line with the ESA definition of takings. These regulations promulgated that "an action that changes or degrades the habitat of a listed marine species, where it actually kills or injures the species by significantly impairing essential behavior patterns, including breeding, spawning, rearing, migrating, feeding, and sheltering, will be a violation of the Act."

Under the MMPA, it can be argued that the activity of whale-watching is a taking due to its intrusive nature. Certainly it can be stated without contradiction, that when a whale is struck and killed by a whale-watch vessel a taking has occurred. In the commercial whale-watch industry, there are voluntary guidelines that vessel operators are encouraged to follow in order to avoid striking or harassing the animal. However, this may not be enough if the mere activity of whale-watching is considered a taking because it harasses the animal under the MMPA. It may be necessary for commercial whale-watch vessels to comply with the requisite permitting from the Secretary of Commerce, under the MMPA for incidental takings.

B. Endangered Species Act of 1973

The Endangered Species Act of 1973 was a consequence of findings by Congress that "various species of fish, wildlife, and plants in the United

31. Hayashi, 22 F.3d at 864.
32. Id.
33. Id.
35. KALO ET AL., supra note 15, at 579.
37. See id.
38. WHALEWATCHING GUIDELINES, supra note 3.
39. Id. § 1374(d).
States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation. Under the protection of the ESA, Congress also recognized species of fish, wildlife, and plants that have been depleted to the point that they are in danger of, or threatened with, extinction. Congress’s purpose in enacting the ESA was to provide a mechanism whereby an ecosystem that is inhabited by endangered or threatened species can be conserved. Further, the ESA was created to render a program for the preservation of endangered species. To facilitate the above goals, the ESA was designed to ensure that all federal departments and agencies utilize their authority to conserve endangered and threatened species.

The ESA has most of its principles and programs rooted in terrestrial species and ecosystems. However, the increasing intensity of marine uses and the decrease in many marine mammal species has given the Act authority in the marine conservation arena. Many marine mammals are also endangered species, namely the right whale, fin whale, and humpback whale. This provides for some overlapping of the statutes when regulating activities that affect marine mammals. The ESA, however, requires that all federal agencies are forbidden from jeopardizing the existence or destroying the critical habitat of listed species, and must enter consultation with the appropriate service when a biological assessment shows that a conflict exists. The ESA prohibits any person from taking any endangered species within the United States or the territorial sea. The term “take” under the ESA “means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

The taking provision in the ESA has been interpreted to include habitat de-
Federal regulations interpreting the term harm under the ESA have recognized significant habitat modification and degradation as appropriate definitions for harm. The most recent interpretation of harm by the Supreme Court also included significant habitat modification and degradation.

When vessels are engaged in whale-watching there is a potential risk for habitat modification, resulting in a taking under the ESA. Coupled with the definition of takings under the MMPA, anyone would be hard pressed to argue that when vessels are approaching whales for any purpose there is not a taking. NMFS recognizes that even if mortality does not result from an activity, any action that injures the species by significantly impairing essential behavior patterns, including breeding, spawning, rearing, migrating, feeding, and sheltering, would be a violation of both the ESA and the MMPA. In most whale-watching situations it would be difficult for any person to tell before approaching a whale whether it is engaged in any of the aforementioned activities. It would be equally complex to ascertain whether a whale's habitat would be modified when an approaching vessel encountered a whale while it was engaged in one of the aforementioned activities. Guidelines for whale watching vessels have no disciplinary action in place, and compliance is completely voluntary. NMFS has made recommendations concerning vessel approach speed and distance that would best avoid injuring whales. Reports have been made that whales are being harassed, injured, and even killed by whale-watching vessels, but without codified regulations in place for whale-watch vessels, it becomes difficult to allocate blame or to hold anyone responsible.

II. PRIOR ATTEMPTS TO PROTECT WHALES

NMFS Northeast Region has already attempted to address the impacts of whale-watching on right whales. On February 13, 1997, NMFS issued an interim final rule prohibiting vessels from approaching within 500 yards

54. See Babbitt v. Sweet Home, 515 U.S. 687 (1995) (holding that "[t]he Secretary construed Congress' intent when he defined 'harm' to include habitat modification").
57. Endangered and Threatened Wildlife and Plants, supra note 34, at 24,149; see also KALO ET AL., supra note 15, at 579.
58. See North Atlantic Whale Protection, supra note 7.
59. Id.
60. Id.
61. Id.
of a right whale. It is believed that this rule has provided the adequate protection necessary to minimize the detrimental affects of whale-watching vessels on this species. The Northeast Implementation Team, established by NMFS to implement the ESA Right Whale and Humpback Whale Recovery Plans, set up the Whale-Watch Advisory Group (WWAG) under its Ship Strike Sub-Committee to look into appropriate measures to address an increased threat to whales as evidenced by the whale-watch vessel strikes in 1998 and reports of harassment in 1999. The WWAG is made up of state and federal agencies, conservation organizations and representatives from the whale-watching industry.

III. WHALE-WATCH GUIDELINES FOR THE NORTHEAST

The whale-watch guidelines in place for whale-watch vessels in the Northeast Region are published by NMFS, a division of the National Oceanic and Atmospheric Administration (NOAA) under the Department of Commerce. Though these guidelines are put into place to protect whales from injury caused by whale-watch vessels, they also are implemented to accomplish the reduction of unlawful harassment outlined in the MMPA and ESA. In March 1999, the WWAG recommended that NMFS revise its 1985 whale-watch guidelines in order to address the issue and prepare an advance notice of proposed rulemaking (ANPR), to solicit comments on the appropriateness of codifying operational procedures for vessels engaged in whale watching in the Northeast Region. On June 1, 1999, NMFS revised the guidelines as requested by the WWAG. The guidelines were revised to provide speed recommendations for vessels and decrease the number of vessels in close proximity to whales. Specifically, these guidelines include a Stand-by Zone (two vessel limit within 300 to

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64. Id.
65. Id.
66. Id.
67. WHALEWATCHING GUIDELINES, supra note 3.
68. Id.
70. Id.
71. Id; see also WHALEWATCHING GUIDELINES, supra note 3; Whale-Watching Advisory Group, REPORT OF THE WHALE WATCH ADVISORY GROUP TO THE SHIP STRIKE SUB-COMMITTEE.
600 feet of any whale),\textsuperscript{72} a Close Approach Zone (one vessel limit within 100-300 feet away from any whale, other vessels must be in stand off zone),\textsuperscript{73} and a No Intentional Approach Within 100 Feet.\textsuperscript{74} When in sight of whales within one to two miles, a vessel should reduce speed to 13 knots, post a dedicated lookout to assist the vessel operator in monitoring the location of all marine mammals, avoid sudden changes in speed and direction, and aircraft should observe the FAA minimum altitude of 1,000 feet over water.\textsuperscript{75} When in sight of whales within one to one-half mile away, a vessel should reduce speed to ten knots and, within one-half mile or less, a vessel should reduce speed to seven knots and maneuver to avoid a head-on approach.\textsuperscript{76} The Close Approach Procedure for 600 feet or closer suggests a vessels should:

1) Parallel the course and speed of moving whales up to the designated speed limit within that distance;
2) Do not attempt a head-on approach to whales;
3) Approach and leave stationary whales at no more than idle or "no wake" speed, not to exceed five knots;
4) Do not intentionally drift down on whales;
5) Vessels in multi-vessel approaches should monitor radios (channels 9, 13 or 16 for hailing), and maintain communications with each other to coordinate viewing; and
6) All vessels in close approach should be aware of navigational obstacles and stay to the side or behind the whales in such a way as not to box in, or cut off the path of, the whales.\textsuperscript{77}

Though these guidelines are put into place to protect whales from injury caused by whale-watch vessels, they are also executed to carry out the reduction of unlawful harassment outlined in the MMPA and ESA.\textsuperscript{78}

\textsuperscript{72} WHALEWATCHING GUIDELINES, supra note 3.
\textsuperscript{73} Id. There can be up to two vessels in the Stand-by Zone; other vessels must remain outside 600 feet. If more than one vessel is within 600 feet, the vessel within 300 feet should limit its time to 15 minutes in the Close Approach Zone to whales. Id.
\textsuperscript{74} Id. If whales approach within 100 feet of a vessel, it is recommended that vessel operators put engine in neutral and not re-engage propulsion until whales are observed clear of harm's way from the vessel. Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
However specific, these guidelines are surprisingly not mandatory for any whale-watch vessel and compliance is completely voluntary.  

IV. THE GUIDELINES IN PLACE FOR WHALE-WATCHING VESSELS ARE ANALYZED

A. NMFS asks, "Should whale-watch guidelines be codified?"

In response to a request by the WWAG, NMFS published on January 4, 2000, a request for comments concerning the appropriateness of codifying operational procedures for vessels engaged in whale-watching in NMFS's Northeast Region. The scope of the request encompassed the activity of any vessel (commercial or private) that is engaged in whale-watching. NMFS requested comments on whether existing whale protection measures are adequate to address the potential threat of injury or mortality by whale-watch vessels to large whales, and, if not, what whale protection measures would be necessary. NMFS offered possible options. Namely, further revisions of the existing whale-watch guidelines including speed limitations, more specific instructions for multi-vessel approaches, and lookout for tracking whales in the vicinity. Also, NMFS suggested codifying the whale-watch guidelines minimum approach rules, and an operator permit or certification program.

B. Center for Marine Conservation Submits Comments to NMFS

On March 6, 2000, the Center for Marine Conservation (CMC) submitted comments in response to NMFS request for comments in the Federal Register on January 4, 2000, regarding the codification of whale-watch guidelines. CMC's comments focused extensively on a combina-

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80. Id. at 270.
81. Id.
82. Id.
83. Id. at 271.
84. Id.
85. See generally Letter from Tammy C. Adams (Marine Mammal Post-Doctoral Fellow) and Nina M. Young (Director of Marine Wildlife Conservation) to Ann Terbush (Chief, Permits Division, Office of Protected Resources of National Marine Fisheries Services), (Mar. 6, 2000) (on file with the Ocean and Coastal Law Journal) [hereinafter Adams].
tion of codifying the existing guidelines and a strong public and industry education component. CMC recommended that at a minimum, NMFS propose that the current guidelines be made into enforceable regulations. CMC also addressed both the take provision in the MMPA and the ESA and suggested that according to these statutes, NMFS must “develop and adopt a set of regulations specific to whale-watch activities that reduces or eliminates the potential for a whale to be taken during these activities.” CMC commented on the voluntary, unenforceable nature of the whale-watch guidelines, the variable compliance by vessels engaged in whale-watching, and again, asserted its position that the guidelines must be made into regulations. CMC continued to support the 500 yard minimum distance for the right whale and suggested that NMFS should consider region specific guidelines and grant greater protection to those species of whales that are highly endangered. CMC also suggested a regulation that would require whale-watch vessels to cease observation of whales if there was a dramatic change in whale behavior. Additionally, CMC asserted that “proposed regulations must be straightforward and easy for the public to understand and obey.” The Center recognized that one of the growing problems with whale-watching is the proportion that is done by uneducated private boaters. Private boaters are often unaware of regulations and unskilled at maneuvering a vessel around whales. CMC used this problem as a catalyst “for the industry to act as an example, and for NMFS to undertake a dedicated public education program.” In their comments, CMC further urged NMFS to create one standard for all vessels (private and commercial), to ensure equality. CMC specifically opposed any regulation that would permit commercial vessels to operate under a less strict set of regulations. CMC suggested further revisions of the existing whale-watch guidelines.

86. Id at 1.
87. Id.
88. Id.
89. Id.
90. Id. at 2.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id. at 3.
97. Id
98. Id. at 3–4.
CMC comments paid particular attention to NMFS's suggestion that operator permits be given to commercial whale-watch vessels based on the operator's knowledge of whale behavior. CMC emphatically rejected the operator permit proposal set forth by NMFS in their request for comments. CMC cited the small take permit provision of the MMPA and stated that permits are only made available for incidental takes. The takings that occur during whale-watching activities could be considered intentional and therefore CMC does not want to give vessels an incidental take permit. CMC explains that whale-watching does not fall under the incidental take permit provisions because the Act requires that the regulations for incidental take must set forth "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. . . ." Whale-watch regulations should be risk averse, and constructed in such a way as to avoid the potential for harassment or take. CMC's comments asserted that "it would be a violation of the MMPA to issue permits for vessels to take whales by engaging in whale-watching activities or to approach more closely than allowed by the prescribed regulations."

V. THE ATLANTIC LARGE WHALE TAKE REDUCTION PLAN: A SUCCESSFUL PROTOCOL TO INCREASE WHALE PROTECTION

Past attempts by NMFS to increase whale protection have succeeded. NMFS has used the method of requesting comments on whale conservation issues in the past, which has yielded stricter laws for the protection of whales. On April 7, 1997 NMFS requested comments on the issue of incidental takings of whales due to fishing gear entanglements and proposed a rule to be implemented. Over 13,000 comments were submitted

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99. Id. at 6.
100. Id.; see also North Atlantic Whale Protection, supra note 7, at 270.
102. Id.
104. Adams, supra note 85, at 6.
105. Id.
107. Id at 16,519.
108. Id.
on the proposed rule. The comments were received from state and Federal agencies, Congressional offices, State legislature representatives, towns, conservation groups, industry associations, businesses, fishermen and other private individuals. There were twelve public hearings from Maine to Virginia, where oral testimony was also heard. NMFS published in the Federal Register an Atlantic Large Whale Take Reduction Plan (ALWTRP), and an interim final regulation implementing that plan on July 22, 1997. The ALWTRP is an evolving plan to minimize the risk to northern right whales and to humpback, fin, and minke whales posed by lobster pot/trap and gillnet gear in the U.S. Atlantic Ocean. The comments, along with a take reduction plan and interim final rule, were published in the Federal Register on July 22, 1997. On February 16, 1999, a final rule was published along with many comments urging NMFS to strengthen the regulations in the interim final rule. These comments came from the States of Maine and Rhode Island; the New England Fishery Management Council; the Rhode Island Coastal Resources Management Council; nineteen conservation organizations, joint letters from eighteen conservation organizations; six fisherman organizations; Cetacean Research Unit; Marine Mammal Commission; New England Aquarium; Washington Legal Foundation; and twenty-three individuals. Approximately 4,700 signatures were also obtained on petitions. The final rule listed ten changes from the interim final rule, but kept the basic goals intact. The final rule implemented a “plan to reduce serious injury and mortality to four large whale stocks that occur incidental to certain fisheries.” The MMPA requires commercial fisheries to reduce the incidental mortality and serious injury of marine mammals to insignificant levels approaching zero.

110. Id. NMFS also requested comments on the interim final rule to be received by Oct. 15, 1997. Id. at 39,157.
111. Id.
114. Id. at 39,157.
116. Id.
117. Id. at 7541.
118. Id.
mortality and serious injury rate by April 30, 2001.”\textsuperscript{121} “For some marine mammal stocks and some fisheries, the MMPA requires NMFS to develop and implement take reduction plans to assist in recovery or to prevent [a decline in the target population].”\textsuperscript{122} “The immediate goal of a take reduction plan is to reduce, within six months of its execution, the mortality and serious injury of stocks taken incidental to U.S. commercial fishing operations to below the Potential Biological Removal (PBR) levels established for such stocks.”\textsuperscript{123} “The long-term goal of a take reduction plan is to reduce, within five years, the incidental [death] and serious injury of strategic marine mammals taken in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate. . . .”\textsuperscript{124} In an attempt to reach its long-term goal the plan would take into account “the economics of the fishery, the availability of existing technology, and existing state or regional fishery management plans.”\textsuperscript{125} The plan, in conjunction with other management actions, was intended to meet the long and short-term goals for right whales, humpback and fin whales, all of which are listed as endangered species under the ESA,\textsuperscript{126} and for minke whales.\textsuperscript{127}

The ALWTRP uses five general strategies to accomplish its goals.\textsuperscript{128} First, during times when right whales are likely to be present, some critical right whale habitats are closed to some types of gear.\textsuperscript{129} Second, there are general prohibitive measures on fishing practices that may cause an entanglement, such as leaving inactive gear in the water.\textsuperscript{130} Third, NMFS is establishing a network of individuals who can aid in the “removing of fishing gear from whales, with a goal of minimizing the seriousness of an entanglement.”\textsuperscript{131} Fourth, NMFS is funding gear research “to develop technological solutions to reduce entanglements.”\textsuperscript{132} Fifth, NMFS is

\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Endangered Marine and Anadromous Species, 50 C.F.R. § 224 (2000).
\textsuperscript{127} 64 Fed. Reg. 7529 (1999).
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
improving its outreach effort to inform fishermen of the whale entangle-
ment problem.\textsuperscript{133}

This plan resulted in the appropriation of a record $4.1 million for
right whale research by the U.S. Congress.\textsuperscript{134} The appropriations were due
to concern over recent right whale deaths caused by ship strikes and
entanglements in fishing gear.\textsuperscript{135} The appropriations for the fiscal year
2000 went to NMFS for gear modification studies.\textsuperscript{136}

The Senate Appropriations Committee also expressed a "concern that
strikes by large vessels have resulted in right whale fatalities," and directed
"NMFS to work with the Coast Guard and the Navy to reduce strikes in
whale habitat areas."\textsuperscript{137}

VI. THE NEXT STEP FOR NMFS IN ESTABLISHING
WHALEWATCH GUIDELINES

A. The Process for NMFS to Implement Regulations

As evidenced by the response from Congress as well as the progress
made by NMFS in the way of creating regulations for commercial fishing
operations, the process of creating an ALWTRP was a success. NMFS has
begun to address the problem of takings that occur during whale-watch
activities by issuing a request for comments in the \textit{Federal Register}.
NMFS, in creating regulations for the whale-watch industry may follow the
same protocol used in establishing regulations for the taking of marine
mammals incidental to commercial fishing operations. If the comments are
heeded, NMFS will enter an interim final rule and request further comment
on the interim final rule. At which point, NMFS will consider the interim
final rule comments and establish a final rule on whether whale-watch
guidelines should be codified and the changes that occurred as a result of
the comments and research.

\begin{footnotes}
\item[133] \textit{Id.}
\item[134] \textit{Right Whale News}, \textit{6 Newsletter of the Southeastern United States
Implementation Team for the Recovery of the Northern Right Whale and the
Northeast Implementation Team} 4,1 (U.S.\ Dept.\ of\ Commerce,\ NOAA,\ Gray's\ Reef
National Marine Sanctuary, Savannah, GA.), Nov.\ 1999.
\item[135] \textit{Id.}
\item[136] \textit{Id.}
\item[137] \textit{Id.}
\end{footnotes}
B. Analysis of the Permitting Provisions in the MMPA and ESA

There is no question that in some instances whale-watch vessels adversely modify the habitat of whales to a lethal extent. In these instances a taking has occurred under the MMPA and under the ESA when the whale is also an endangered species. Civil penalties can be assessed under the MMPA and ESA when negligent or intentional actions take a marine mammal. Criminal penalties may also commence under the MMPA and ESA where the actor knowingly violates the provisions of the Act. The MMPA provides that the Secretary may issue a permit for the unintentional taking of marine mammals incidental to commercial fishing and upon the request by a citizen engaged in a specified activity (other than commercial fishing) as long as the takings of marine mammals would be incidental and not intentional. The counterpart provision of the ESA provides that the Secretary can issue a permit for takings that "are incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." It is easy to establish that whale-watching activities do not fall under the guise of commercial fishing. What becomes difficult to ascertain is whether whale-watching activities are within the realm of such specified activities that Congress intended to have permitted for the incidental takings of whales under the MMPA. Equally difficult to determine under the ESA, is whether takings by whale-watch vessels can ever be incidental because the purpose of the legal activity (whale-watching) is to pursue whales in their natural environment. The comments submitted by the CMC asserted that takings by whale-watch vessels could never be considered as a whole incidental, the explanation being that “takings” of whales by whale-watch vessels could for the most part be considered intentional and therefore not incidental. CMC emphatically rejected any operator permit program.

139. See id. § 1532 (19).
140. See id. § 1375(a)(1).
141. See id. § 1540(a)(1).
142. See id. § 1375(b).
143. See id. § 1540(b)(1).
144. See id. § 1371(a)(2).
145. See id. § 1371(a)(5)(A).
146. Id. § 1539(a)(1)(B).
147. See id. § 1371(a)(5)(A).
148. See Adams, supra note 85, at 6.
149. See id.
150. See id.
1. Classifying Takings as Incidental or Intentional

The question becomes whether the takings that have occurred (and will occur due to whale-watching activities) are incidental to the activity, or intentional takings. If NMFS decides that the takings that occur are incidental to whale-watching activities, then NMFS could implement a permitting program under the provisions of the MMPA\(^{151}\) and ESA\(^{152}\) that allow permitting. The MMPA specifically states that:

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\text{[u]pon request therefore 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 . . . and opportunity for public comment.}^{153}
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The ESA specifically provides that "[t]he Secretary may permit, under such terms and conditions as he shall prescribe any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."\(^{154}\) Both provisions provide for the permitting of activities that may engage in takings incidental to the specific activity. NMFS could, however, agree with the comments of CMC and decide that the takings that occur are intentional and therefore non-compliant with the permitting provisions of the MMPA and ESA.

2. Punitive Measures

If NMFS decides that the takings that occur during whale-watching are intentional, the codified guidelines, in conjunction with the MMPA and ESA, would be the sole means of enforcement. Under the civil and criminal penalties of both Acts, a violator could be fined and/or jailed, but could still engage in whale-watch activities after the penalty phase.

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152. Id. § 1539(a)(1)(B).
153. Id. § 1371(a)(5)(A).
154. Id. § 1539(a)(1)(B).
A permitting process for commercial whale-watch boats would only allow incidental takes of whales; it would not allow for intentional takes that the MMPA and ESA specifically forbid. The permit could allow NMFS a punitive measure of revoking the permit if indeed an intentional take was reported and found. CMC fears that a permit would give whale-watching vessels the permission to take whales or to approach more closely than the prescribed regulations. Because the animals at issue here are protected under the MMPA and the ESA, NMFS should not create less stringent regulations for commercial whale watch vessels. It is the policy of the ESA that "all Federal departments and agencies shall seek to conserve endangered species and threatened species . . ." Therefore, it is already established that NMFS could not take any affirmative action that would be in contradiction of the policy laid out in the ESA. But, because whale-watch vessels are engaged in a legal activity, which could involve incidental takings, they should be subject to the permitting provisions of both Acts. This is not to say that if an intentional taking of a marine mammal did occur an operator could use his/her permit to evidence his compliance with either Act. It will still be prohibited to take any marine mammal or any marine mammal that is endangered. The permitting program would only allow for incidental takings, and permits could be revoked for intentional takings. The permitting process could also allow for the much needed education component that CMC discussed extensively in their comments to NMFS. Through the permitting process, NMFS could make all commercial whale-watch vessel operators aware of the regulations in effect and the penalties for violating them. NMFS could bring the MMPA and the ESA to the attention of the whale-watch vessel operators and inform them of the penalties. This would allow the industry to take a lead by example approach with private boaters.

155. See Adams, supra note 85, at 6.
156. 16 U.S.C. § 1531(c).
157. See Adams, supra note 85, at 7.
C. Private Boaters and the Whale-Watch Guidelines

1. Education Can be the Key Component to Reducing the Risk to Whales

It would seem arduous to hand out a permit to every private boat operator who wanted to engage in whale-watching. The process would seem burdensome with permits being issued to operators who may engage in whale-watching once or twice a season or not at all. The permitting process should be left to those commercial vessel operators that will make several trips a day for an entire season. Private boaters raise a different issue altogether. If regulations are put into place it becomes difficult to ascertain how NMFS will convey these regulations to the average private boat operator. The education component for the public sector is a main concern for CMC\textsuperscript{158} and should be for NMFS. Making information available to boaters at public boat access ramps and private boat marinas would allow for some coverage but would undoubtedly remain insufficient. Definitely making these regulations part of the boater’s safety courses offered in different areas would aid in the education component as well.

2. Consistency Between Private and Commercial Vessels

Because the ESA has a policy which declares that all federal agencies must seek to conserve endangered species,\textsuperscript{159} private or commercial boaters must not be granted a closer approach zone or increased speed limitations. To remain consistent, private boaters engaged in whale-watching should be subject to the same regulations as are commercial vessels. Where private boaters are observing whales in the same location and at the same time, this will also aid commercial vessels to lead by example. Private boaters who are reported to have violated the MMPA or ESA regulations should be subject to the same penalties to which commercial vessels are subject. If whale-watch guidelines are made into regulations, consistency throughout the implementation of the regulations seems undoubtedly key to its success.

\textsuperscript{158} See id.
\textsuperscript{159} 16 U.S.C. § 1531(c)(1).
VII. NEW ZEALAND: A SUCCESSFUL PROTOCOL FOR WHALE-WATCH REGULATIONS

New Zealand, located in the southeast Pacific Ocean, has an abundance of diverse marine mammals. The population of many large whales (such as the southern right whales and humpback whales) were reduced to near extinction by the whaling industry of the past two centuries. "Some are still threatened or endangered, and now face additional threats from habitat degradation, global climate change, by-catch in fishing operations and accumulation of pollutants in the oceans." The Department of Conservation administers New Zealand’s own Marine Mammals Protection Act of 1978. New Zealand’s Marine Mammals Protection Act provides for the conservation, protection, and management of marine mammals. As with the United States’ version of the MMPA, New Zealand requires a permit for anyone to “take” a marine mammal. Under this Act, the term “take” includes actions that harm, harass, injure and attract. The Act prohibits directed takes but it does not prevent accidental takings of marine mammals in fishing operations (by-catch). The Act further provides for the establishment of marine mammal sanctuaries where the Minister of Conservation can strictly control fishing industries. There are two marine mammal sanctuaries in New Zealand, one around Banks Peninsula and the second around the Auckland Islands.

The Department of Conservation also administers the Marine Mammals Protection Regulations. These Regulations were developed to manage the rapidly growing whale-watching industry. The regulations establish a public procedure for applying for permits to escort passengers to view marine mammals and describes appropriate behavior for all boats and aircraft in the vicinity of whales. Significant research is being conducted

161. Id.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
172. Id.
to assess the impact of whale-watching vessels on the behavior of sperm whales and dusky dolphins at Kaikoura, and bottlenose dolphins in the Bay of Islands.\textsuperscript{173} In the future, taxes charged to passengers will fund research programs.\textsuperscript{174}

The regulations in New Zealand have already been put into place and are overseen by the Department of Conservation.\textsuperscript{175} The success of New Zealand's regulations is in large part due to the permitting process of boaters that escort passengers to view whales. The permitting process allows for vessel operators to be made aware of the appropriate procedures for approaching whales. If NMFS were to adopt a similar permitting procedure for vessel operators, its success would also depend upon educating vessel operators.

VIII. THE SUCCESS OF THE ESA

A. The Comprehensive Nature of the Act

Other laws often lack the strict substantive provisions that Congress included in the ESA regarding taking of species, critical habitat, and avoidance of jeopardy.\textsuperscript{176} Because of those deficiencies, the ESA often becomes the legal premise that everyone relies upon.\textsuperscript{177} Recently, pressures over the ESA have expanded as species have been added to the protected list, and as the greater demands of a growing economy and human population have affected species' habitats.\textsuperscript{178} Both Congress and NOAA have sought to ease tensions by adapting the utility of the Act to special local circumstances.\textsuperscript{179}

The debate concerning the support of the ESA is largely split among demographic lines.\textsuperscript{180} The support for conservation, though widely accepted by persons everywhere, is more strong among urban and suburban groups, than among rural groups.\textsuperscript{181} Conservation is most strongly

\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
supported in the east and along the coasts, and less so in central and mountain areas.\textsuperscript{182} Some industries (logging and land development) see the ESA as a major problem, while others (commercial fishing and many recreational industries) see it as generally supporting their interests.\textsuperscript{183}

### B. Its Faults and Successes

Since a major goal of the ESA is the recovery of species to the point at which the protection of the Act is no longer needed, it would seem like the Act has not been very successful.\textsuperscript{184} Only eleven species have been de-listed due to recovery since November 16, 2000.\textsuperscript{185} Seven species have become extinct since their listing.\textsuperscript{186} Twelve species have been de-listed due to improved data.\textsuperscript{187} This seems to show that the Act needs more work. The role of Congress is to make amendments to the ESA to ensure further protection of endangered species and their habitats. Though there has been a study that implies that 41\% of listed species have improved or stabilized their population levels,\textsuperscript{188} there are many activities that affect endangered species that are not addressed specifically in the Act.

### C. The Role of Congress

It may seem relevant for Congress to address the issue of viewing endangered species in conjunction with the potential for altering the habitat. As with any recreational activity that involves observing wildlife, the potential for harassing the animal is always present. In the instance of whale-watching, vessels are moving around the animals and passengers are eagerly waiting to get a glimpse of whales. If Congress would address the issue of habitat modification by those viewing an endangered species, NMFS may not have to answer the difficult question of whether a taking is incidental to the activity or whether whale-watching is an activity which can be permitted under the Act. An amendment to the Act concerning the viewing of endangered species would also decrease the number of lawsuits.

\begin{footnotes}
\item[182.] Id.
\item[183.] Id.
\item[184.] Id.
\item[185.] Id.
\item[186.] Id.
\item[187.] Id.
\item[188.] Id.
\end{footnotes}
that may ensue if permits are granted and then suspended due to non-compliance.

IX. CONCLUSION

With the growing popularity of whale-watching as a recreational activity both commercial and private, it has become increasingly clear that regulations need to be implemented for the proper method by which vessels should engage in this activity. The report of deaths and injuries in recent years gives an even more critical reason for regulations to be promulgated. The regulations should specify approach methods and speed limits similar to those outlined in the current voluntary guidelines. In addition to the regulations, NMFS should consider a permitting program for vessel operators that would, in addition to the penalties under the MMPA and ESA, provide recourse against vessel owners that intentionally take. The permitting program should address takings of whales incidental to the activity of whale-watching and never permit the intentional taking of whales as proscribed in the MMPA and ESA. Private boaters should follow the same guidelines as outlined in the policy of the MMPA and ESA; namely, to remain risk averse.

The attempts by NMFS in the past to increase whale protection have been a success, at least to the point that these regulations were put into effect. The method of requesting comments in the past has yielded stricter laws for the protection of whales. With comments such as those submitted by CMC, NMFS can make forward progress in the direction of codifying the existing whale-watch guidelines. The presence of a need for whale-watch regulations coupled by the still unknown effects of whale-watching vessels on whale habitats may encourage Congress to appropriate funds for research as they have done in the past for whale conservation.

NMFS might also consider the regulations and procedures set forth by New Zealand. Because New Zealand has its own version of the MMPA, its ideas concerning takings and habitat seem in line with the United States' understanding of those terms. New Zealand, having already implemented a permitting process for whale-watch vessels, may have the research already in place that would provide NMFS with enough knowledge to see if a similar plan would be feasible in the United States.

Finally, Congress may have to do more in the way of amending the ESA to include provisions specific to persons involved in viewing endangered species. The Act has a comprehensiveness that is second to none, but the endangered species list continues to grow, leaving the success of the Act vulnerable to failure. If Congress can continue to address the Act’s
problems by working with NMFS and funding research, the results could aid in carrying out the purposes set forth in the Act.