

Register Order Form

THURSDAY, JANUARY 11, 1979
PART III



**DEPARTMENT OF
COMMERCE**

**National Oceanic and
Atmospheric
Administration**



**TAKING OF CERTAIN
ALASKA MARINE
MAMMALS**

**Waiver of the Moratorium, Final
Rule**

[4310-55-M]

Title 50—Wildlife and Fisheries

CHAPTER I—UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

SUBCHAPTER B—TAKING, POSSESSION, TRANSPORTATION, SALE, PURCHASE, BARTER, EXPORTATION, AND IMPORTATION OF WILDLIFE AND PLANTS

PART 18—MARINE MAMMALS

Waiver of the Moratorium on the Taking of Three Alaska Marine Mammals

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final Rule.

SUMMARY: As part of an eventual return of management authority to the State of Alaska, regulations are issued which allow, subject to certain conditions, the taking of polar bears, sea otters, and Pacific walrus in Alaska or adjacent waters. The regulations waive the moratorium on such taking imposed by the Marine Mammal Protection Act. The regulations will not be effective until the Director approves the laws and regulations of the State of Alaska governing these mammals.

EFFECTIVE DATE: [Will be published by the Director at a later time.]

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

DIRECTOR'S DECISION

Background. On January 31, 1973, the State of Alaska requested that it be granted management authority over certain marine mammals pursuant to Federal approval of its proposed marine mammal regulations. See 16 U.S.C. 1379(a)(2). Alaska's proposed regulations deal with a number of marine mammals, three of which, the polar bear (*Ursus maritimus*), sea otter (*Enhydra lutris*), and Pacific walrus (*Odobenus rosmarus*), are placed under the Department's jurisdiction by the Marine Mammal Protection Act. 16 U.S.C. 1362(5)-(6), (12); 50 CFR 18.3. Because Alaska's proposed regulations allow taking of these mammals, approval of those regulations is necessarily contingent upon a waiver of the Act's moratorium on taking. See 16 U.S.C. 1371(a).

On April 5, 1976, the Director approved Alaska's Pacific walrus regula-

tions and issued Federal regulations waiving the moratorium on the hunting and killing of this mammal 50 CFR 18.58, 18.94; 41 FR 14373. (For more detailed information concerning this earlier walrus waiver and return of management authority to the State of Alaska, see section *infra* entitled "Waiver of the Moratorium—Pacific Walrus.") On April 9, 1976, the Service published proposed regulations to modify the walrus waiver if revised Alaska regulations governing walrus were approved. 41 FR 15166. On April 9, 1976, the Service also announced its intention to review Alaska's regulations on polar bears and sea otters, and published proposed regulations to waive the moratorium on the taking of these mammals if the State regulations were approved. *Id.* After formal hearings on the record, Administrative Law Judge Malcolm Littlefield, on June 30, 1977, issued a recommended decision that regulations waiving the moratorium on the taking of polar bears and sea otters, and modifying the walrus waiver, be promulgated. Rec. Dec. 1, 91-92, 137-139; see also notice concerning this recommended decision at 42 FR 37215 (July 20, 1977). The portions of the Judge's recommended decision that are pertinent to these waiver regulations are adopted to the extent that such portions are consistent with the discussion, findings, and conclusions set forth herein.

Citations to Hearing Record and Recommended Decision. As used in this preamble: "ALJ" means Administrative Law Judge; "Br." means brief; "EDF" means Environmental Defense Fund; "Exh." means exhibit; "FWS" means U.S. Fish and Wildlife Service; "MMC" means Marine Mammal Commission; "Rec. Dec." means Recommended Decision (for these regulations) dated June 30, 1977, in the Matter of the Request of the State of Alaska to Waive the Moratorium on Nine Species of Marine Mammals and Allow the State to Resume Management, MMPA Docket No. Wash 76-1; "Rep. Br." means reply brief; "Tr." means transcript for the hearings on these regulations held in Alaska; "Walrus Rec." means the hearing record for the Pacific walrus regulations issued by the Service on April 5, 1976, 50 CFR 18.92-18.94, 41 FR 14372 (1976); see also 40 FR 59459 (1975); and "Wash. Tr." means transcript for the hearings on these regulations held in Washington, D.C.

Waiver of the Moratorium—General Requirements. As indicated previously, the Marine Mammal Protection Act imposes "a moratorium on the taking * * * of marine mammals." 16 U.S.C. 1371(a). However, the Act also provides that the Secretary may issue regulations which waive the moratorium and allow the taking of marine mam-

mals. 16 U.S.C. 1371(a)(3)(A), 1973. The Secretary's authority under the Act has been delegated to the Director. 242 Interior Departmental Manual 1.

(The Act also imposes a moratorium on the importation of marine mammals. 16 U.S.C. 1371(a). However, since Alaska does not propose to allow the entry of mammals coming from foreign territories or beyond the waters under the jurisdiction of the United States, the regulations hereby published do not waive the moratorium on importation. See generally, 16 U.S.C. 1362(15), 1371(a)(3)(A); 50 CFR 10.12, 18.3; S. Rep. No. 92-863, 92d Cong., 2d Sess. 7,13 (1972) (hereinafter cited as "Senate Report").)

Regulations waiving the moratorium must comply with a number of substantive and procedural requirements. With respect to procedure, waiver regulations may be issued only after consultation with the Marine Mammal Commission. 16 U.S.C. 1371(a)(3)(A), 1373(a). There must be notice and an opportunity for a formal agency hearing on the record. 16 U.S.C. 1373(d). At the time the regulations are proposed, or before that time, the Service must publish and make available to the public statements setting forth the estimated existing population levels of the marine mammal stocks concerned, the expected impact of the regulations on the stocks' optimum sustainable populations, and the evidence upon which the regulations are based. 16 U.S.C. 1373(d)(1)-(3). The Service must also publish any studies and recommendations made by or for it or the Marine Mammal Commission which relate to the regulations. 16 U.S.C. 1373(d)(4).

The present regulations fulfill these procedural requirements. The draft environmental impact statement prepared in conjunction with the regulations, which was made available for public inspection and copying on March 5, 1976 (41 FR 9588), contained detailed statements concerning the estimated population levels of polar bears, sea otters, and Pacific walrus, the expected impact of the regulations on the optimum sustainable populations of the three mammals, and the evidence underlying the regulations. These statements were summarized in the notice of proposed rulemaking for the regulations. 41 FR 15166, 15167-15169 (April 9, 1976). The notice of proposed rulemaking also announced that the preparation of the draft environmental impact statement was the only known study relating to issuance of the regulations. 41 FR 15169.

After the proposed regulations were published, they were the subject of formal hearings on the record that were held in Alaska from June 29 through July 20, 1976, and in Wash-

ington, D.C., on October 19 and 20, 1976. The hearings provided the means for consultation with the Marine Mammal Commission, since the Commission participated fully in the proceeding, presenting evidence and advocating its position. The Commission was also consulted before publication of the proposed regulations and the draft environmental impact statement.

With respect to substantive requirements, regulations waiving the moratorium must be based on "the best scientific evidence available." 16 U.S.C. 1371(a)(3)(A), 1373(a). Full consideration must be given to the regulations' effect on "the distribution, abundance, breeding habits, and times and lines of migratory movements" of the three mammals and on their "existing and future (population) levels, (any) existing international treaty and agreement obligations of the United States * * * the marine ecosystem and related environmental considerations * * * the conservation, development, and utilization of fishery resources * * * and * * * the economic and technological feasibility of implementation." 16 U.S.C. 1371(a)(3)(A), 1973(b). In addition, the waiver regulations must insure that any taking permitted thereby will not be to the mammals' disadvantage and will be consistent with the Act's purposes and policies. 16 U.S.C. 1371(a)(3)(A), 1373(b), 1374(b)(1), (d)(3).

The Act's purposes and policies are stated as follows:

"* * * certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities * * *

"Such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions * * *

"Marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the optimum carrying capacity of the habitat." 16 U.S.C. 1361(1)-(2), (6).

In addition, the Act imposes a number of specific restrictions on taking under a waiver, including a requirement that all taking be authorized by a permit and be done in a humane and non-wasteful manner. See 16 U.S.C. 1371(b)(3), 1374; 50 CFR 18.3.

A number of these substantive requirements need further discussion.

The Act defines a "humane" method of taking as "that method * * * which involves the least possible degree of pain and suffering practicable to the mammal involved." 16 U.S.C. 1362(4). Regulations implementing the Act define a "wasteful manner" of taking as " * * * any taking or method of taking which is likely to result in the killing or injuring of marine mammals beyond those needed for subsistence purposes or for the making of authentic native articles of handicrafts and clothing or which results in the waste of a substantial portion of the marine mammal and includes without limitation the employment of a method of taking which is not likely to assure the capture or killing of a marine mammal, or which is not immediately followed by a reasonable effort to retrieve the marine mammal." 50 CFR 18.3. To be approved by the Director, Alaska's laws and regulations governing polar bears, sea otters, and Pacific walruscs must insure that only humane and non-wasteful methods will be used in taking these mammals. 50 CFR 18.55(h), 43 FR 45373 (Oct. 2, 1978).

Regulations waiving the moratorium must take into account not only effects on entire species but also effects on individual "population stocks." 16 U.S.C. 1373. The Act defines "population stock" or "stock" as "a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature." 16 U.S.C. 1362 (11). In his recommended decision on the present regulations, the Administrative Law Judge found that a single population stock does not mean that each animal in the stock has an equal opportunity to interbreed with every other animal, but rather that there are no barriers which prevent a continuous genetic interchange throughout the stock's range. Rec. Dec. 53. The Director adopts this finding.

Before issuance of regulations waiving the moratorium, it must be shown that the species or stock in question is at or above its "optimum sustainable population" and that the taking permitted by the waiver will not reduce the species or stock below that level. 16 U.S.C. 1361(2), (6), 1373(a), (b)(1); See also, *Committee for Humane Legislation, Inc. v. Richardson*, F. Supp. 297, 311-312 (D.D.C. 1976), *aff'd* 540 F. 2d 1141, 1149-1150 (D.C. Cir. 1976).

The Act defines "optimum sustainable population" (OSP) as:

"* * * the number of animals which will result in the maximum productivity of the species, keeping in mind the optimum carrying capacity, of the habitat and the health of the ecosystem of which they form a constituent element." 16 U.S.C. 1362(9).

The National Marine Fisheries Service (NMFS) has interpreted the Act's definition to mean:

"a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality." 50 CFR 216.3; 41 FR 55536 (Dec. 21, 1976).

For the reasons set forth below, the Director accepts this definition of OSP.

The Administrative Law Judge and Marine Mammal Commission concluded that OSP falls within a range of population levels. Rec. Dec. at 37; ALJ Exh. 6 at 1-2. This finding appears reasonable in view of the references in the Act's definition to both maximum productivity and carrying capacity. 16 U.S.C. 1362(9). Furthermore, in *Committee for Humane Legislation v. Kreps*, No. 77-0564 (D.D.C. July 6, 1977), Judge Richey found that the NMFS definition of OSP as referring to a range of population sizes was reasonable and consistent with the Act.

The NMFS interpretation construes "maximum productivity" in the Act's definition to mean maximum net productivity, or the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction or growth of the animals less losses due to natural mortality. This definition is consistent with the accepted management practice of measuring productivity in terms of the annual production of new animals or the annual growth of the biomass (the aggregate weight of all the animals in the population). Maximum net productivity was held to be a reasonable interpretation of maximum productivity in *Committee for Humane Legislation v. Kreps, supra*.

Maximum net productivity is also different from the "maximum sustained yield" (MSY) level rejected by Congress, the Marine Mammal Commission, and the Administrative Law Judge because it jeopardizes the health and stability of both the mammals and their ecosystem. H.R. Rep. No. 92-707, 92d Cong., 1st Sess. 22 (1971) (hereinafter cited as "House Report"); Hearings on Marine Mammals Before the Subcomm. on Fisher-

ies and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92d Cong., 1st Sess. ser. 92-10, at 401 (1971) (hereinafter cited as "House Hearings"); Rec. Dec. at 35-37; ALJ Exh. 6 at 3. As the Commission and Administrative Law Judge have pointed out, management under the MSY theory keeps the population at the level where it produces the greatest number of new animals of the age and sex of interest to man. Rec. Dec. at 35; EDF Br., App. 4 at 8. This level may be considerably different from the one resulting in maximum net biological productivity, which occurs regardless of whether or not there is a harvest. *Id.* Furthermore, an essential component of MSY management is its level of taking: a harvest of all animals not needed to maintain the population at the maximum productivity level. ALJ Exh. 6 at 2. A harvest this large prevents the population from growing. *Id.*; Rec. Dec. at 34. A smaller harvest that allows growth of the population is not consistent with the MSY theory.

Under the NMFS definition, the upper boundary of the OSP range is the population size that is the largest supportable by the ecosystem. A population at this level is said to be at the carrying capacity of its habitat; in other words, at its maximum natural level or "equilibrium unexploited level." Rec. Dec. at 37; ALJ Exh. 6 at 1. Neither Exh. 5 at 6. This level was found to be a reasonable upper boundary for OSP by Judge Richey in *Committee for Humane Legislation v. Kreps, supra*.

At the hearings on these regulations, it was argued that the carrying capacity or equilibrium unexploited level should be the only level of OSP. However, in certain instances, it may be to the advantage of a stock to be reduced below the carrying capacity level. At the carrying capacity level, a significant number of animals may suffer from disease, malnutrition, and aggressive behavior due to increased competition for space and food. ALJ Exh. 6 at 3. Stocks at the carrying capacity level may also be vulnerable to losses of food and essential habitat areas resulting from shifts in weather and other factors. *Id.* Furthermore, if OSP were equivalent to carrying capacity, taking under a waiver would be allowable only in instances of overpopulation. Yet it is clear that Congress did not intend overpopulation to be the sole basis for a waiver. 16 U.S.C. 1374(b); House Report at 20, 25; Senate Report at 16-17; H.R. Rep. No. 92-1482, 92d Cong. 2d Sess. 24 (1972) (hereinafter cited as "Conference Report").

For the reasons discussed above, the Director accepts the definition of OSP adopted by the National Marine Fish-

eries Service in which OSP is defined as a population size falling within a range that is bounded by the level at the carrying capacity of the habitat and the level resulting in maximum net productivity.

Regulations waiving the moratorium must insure that any taking permitted will not be to the "disadvantage" of the species or stock concerned. The Director accepts the finding of the Administrative Law Judge that a species or stock is disadvantaged if it is below or above the range of its OSP. See Rec. Dec. 40-41.

The Director also accepts the finding of the Administrative Law Judge that a species or stock is depleted under section 3(1)(C) of the Act, 16 U.S.C. 1362(1)(C), if it is below the range of its OSP. See Rec. Dec. 39-41.

Waiver of the Moratorium—Polar Bears. The Administrative Law Judge found that there are two stocks of polar bears in Alaska and adjacent waters, a northern stock and a western stock. Rec. Dec. 54, 79. The northern stock is made up of bears found north and east to the Canadian border from a line extending northwest from Point Lay, Alaska, and the western stock is made up of bears found west and south of that line. Rec. Dec. 78-79. Bears from the western stock have larger skulls and bodies, while those from the northern stock have higher mercury levels. Rec. Dec. 53. These findings are well supported in the hearing record for these regulations, FWS Exh. 8 at 326-327; Tr. 32; MMC Exh. 7 at 4, and are accepted by the Director.

The Administrative Law Judge found that each stock of polar bears is within the range of its OSP. Rec. Dec. 80-81. He further found that the annual taking of 170 bears (one-third of that figure to be taken from the northern stock and two-thirds from the western stock) would not reduce either stock below the range of its OSP and maintain the health and stability of the marine ecosystem. Rec. Dec. 83-86. He therefore recommended a waiver of the moratorium to allow this level of taking. Rec. Dec. 86.

The Judge's decision and the accompanying record show that due consideration has been given to the range and distribution of the two stocks, Rec. Dec. 66, 78-82, 84, FWS Exh. 1 at 1, 6, Exh. 2 at 367, Exh. 5 at 44, 46, Exh. 8, Exh. 10 at 2-3, Tr. 32, 68, 81-83, 114; the abundance and population levels of the stocks (see discussion of OSP below); the bears' breeding and reproduction habits, Rec. Dec. 65, 84, 132, FWS Exh. 1, at 1-2, Exh. 7, Exh. 10 at 3-4, MMC Exh. 6, Tr. 41, 48, 63, 68, 85, 106-109; the bears' migrations with respect to seasons, movement of the ice, and availability of food, Rec. Dec. 65, 84, 132, FWS Exh. 1, at 1, 7,

Exh. 2 at 367, Exh. 5 at 46, Tr. 66, 90-91, 101, 108; the international Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 13 Int'l Leg. Mats. 13-18 (1974), Rec. Dec. 68, 85, FWS Exh. 1 at 12-13, Exh. 6 at 8-9, Exh. 9, Exh. 13, Exh. 23, MMC Exhs. 5-6, FWS Br. at 62; the relationships between polar bears and seals, fish, and other components of the marine ecosystem, Rec. Dec. 37-38, 83, FWS Exh. 1 at 1, 7, Exh. 10 at 3, MMC Exh. 6, Tr. 35-36, 84-85, 90-91, 102, 104-106; the conservation, development, and utilization of fishery resources, Rec. Dec. 37-38, FWS Exh. 1 at 7, Tr. 36, 84-85; and the feasibility of implementing the present regulations as well as those proposed by the State of Alaska, Rec. Dec. 63-65, 69-72, 84, 122-123, 127-128, Tr. 39-43, 46-47, 54-56, 69-70, 96, MMC Exh. 6.

On the question of OSP, the Service's expert on polar bears estimated that there are between 2,300 and 2,600, or approximately 2,500, bears in the northern stock, and between 6,400 and 7,200, or approximately 7,000, bears in the western stock. FWS Exh. 1 at 4; Exh. 19; Tr. 32, 57. These estimates were obtained by computer modeling with a wildlife population model developed at the Cooperative Wildlife Research Unit, Colorado State University. FWS Exh. 1 at 4. The model utilized population composition data obtained from bears taken by hunters since 1961 and from bears captured for marking and later recovery pursuant to a program started in 1967. FWS Exh. 1 at 4-5; Exh. 19; Tr. 58. The Service's expert also testified that in his opinion, polar bears are probably approaching the carrying capacity level and are widely distributed, being found in most, if not all, of the habitat that is suitable to them. Tr. 36-37, 78-79.

Based on this evidence, the Service's polar bear expert concluded that each stock of polar bears was within the range of its OSP. Tr. 33-37.

The Marine Mammal Commission agrees with the Service's expert that the northern stock is approximately half the size of the western stock. MMC Exh. 7 at 4, MMC Br. at 9. However, the Commission disagrees with the Service's witness on the number of animals in the two stocks.

The Commission questioned the reliability of the Service's computer estimates because of lack of information on how the computer model was constructed or used. MMC Exh. 7 at 2; Wash. Tr. 233. The Commission also submitted an estimate of its own—a total of 6,100 bears for the two stocks combined. MMC Exh. 8 at 1; Wash. Tr. 32. This estimate was based on analysis of the age composition of adult males killed annually by hunters and on an assumption that the bears' natu-

ral mortality rate is 5 percent. MMC Exh. 7 at 2-3; Exh. 8 at 1; Wash. Tr. 32. The Commission further concluded that the "best scientific estimate" is 5,700 bears for the two stocks combined. MMC Exh. 8 at 1; Wash. Tr. 32, 233-234. This estimate was obtained by averaging a 1959 estimate of 2,500 bears based on an aerial survey by sport hunting guides, a 1972 estimate of 4,925 bears based on analysis of the ages of male bears harvested over a five-year period, the Commission's 1976 estimate of 6,100 bears, and the Service's 1976 computer estimate of 9,500 bears. MMC Exh. 7 at 2; Exh. 8 at 1; FWS Exh. 1 at 2, 4; Exh. 2 at 367-369, Exh. 4; Wash. Tr. 32, 233-234. The 5,700 estimate was accepted by the Administrative Law Judge, Rec. Dec. 86, and as noted by the Commission, it is significantly close to an estimate of 5,500 bears that can be obtained by averaging the 4,925 and 6,100 figures regarded by the Commission as the most reliable of the four. MMC Exh. 8 at 1; Wash. Tr. 233-234.

By comparing the average number of polar bears killed annually from 1961 to 1972 with the lower annual average before 1961 (see FWS Exh. 1 at 8-9), the Commission concluded that the level of killing from 1961 to 1972 was not such that it would have reduced the polar bear population below the level of maximum productivity. Wash. Tr. 235; MMC Exh. 7 at 1. The Commission therefore concluded that the two polar bear stocks are within the range of OSP. MMC Exceptions at 5.

Believing it safer to adopt the more conservative estimate, the Director accepts the finding of the Commission and the Administrative Law Judge that the best scientific estimate of the total Alaska polar bear population is 5,700 bears. Accepting the views of both the Commission and the Service's expert that the northern stock is approximately half the size of the western stock, their respective populations are estimated to be 1,900 and 3,800 bears. Based on the evidence presented by both the Service and the Commission, the Director finds that each stock is within the range of its OSP.

The Administrative Law Judge and Marine Mammal Commission found that the annual taking of 170 polar bears (one-third of that figure to be taken from the northern stock and two-thirds from the western stock) would not reduce either stock below the range of its OSP and would maintain the health and stability of the marine ecosystem. Rec. Dec. 83-86; MMC Br. at 9. Accordingly, both the Judge and the Commission recommended a waiver of the moratorium to allow this level of taking.

Allocating approximately one-third of the total annual limit of 170 bears

to the northern stock and approximately two-thirds to the western stock, their respective individual limits would be 55 and 115 bears. This level of taking would constitute only 2.89 and 3.03 percent of their respective estimated populations of 1,900 and 3,800 bears. The hearing record for these regulations indicates that the net annual recruitment of new bears to each stock is between 6 and 10 percent of its population. FWS Exh. 1 at 4; Tr. 47-48. Thus, limits of 55 and 115 bears for the northern and western stocks, respectively, will permit both stocks to continue to increase in abundance, see Rec. Dec. 86, MMC Br. at 9, and this increase will insure that they remain within the range of OSP and continue to be significant functioning elements in their respective ecosystems. The Director therefore concludes that a waiver of the moratorium to allow the annual taking of 55 polar bears from the northern stock and 115 polar bears from the western stock is appropriate under the Act.

Waiver of the Moratorium—Sea Otters. The Administrative Law Judge found that sea otters in Alaska occur in a number of individual colonies, but that these colonies are all part of one stock. Rec. Dec. 54-55, 90. The Director accepts this finding. It is well supported by the record for these regulations which shows that there has been interbreeding between colonies and establishment of new colonies as a result of sea otters crossing the largest geographical barriers within their range. FWS Exh. 15 at 4-6; Tr. 154-156, 178-179, 182, 229, 250-251. The Marine Mammal Commission concluded that, genetically, sea otters in Alaska "must be treated as a single population." Wash. Tr. 244.

The Administrative Law Judge found that the Alaska sea otter stock as a whole is within the range of OSP but that individual colonies of the stock are at various levels within that range, and at least two are either below, or barely at, the lower boundary of OSP. Rec. Dec. 1,88,90,137. The Judge also found that the annual taking of 3,000 sea otters from the Rat Islands-Delarf Island colony and the Andreanof Islands colony, if allocated between the two groups, "would be within the range of OSP and present no immediate threat to the species." Rec. Dec. 89-90. However the Judge believed that a waiver of the moratorium on the entire stock would be "legally inappropriate." Rec. Dec. 90.

As with polar bears, the Administrative Law Judge's decision and the accompanying record show that due consideration has been given to the range and distribution of the sea otter stock, Rec. Dec. 54,89, ALJ Exh. 3 at 31-32; FWS Exh. 15 at 2-16, Exh. 16 at 1-2, Tr. 154-156, 226-229; the abundance

and population levels of sea otters (see discussion of OSP below); the otters' breeding and reproduction habits, FWS Exh. 15 at 22-23, Tr. 178-179, 194, 225, 232; the otters' migrations across stretches of water from densely populated areas to sparsely populated or unpopulated areas, Rec. Dec. 54-55, FWS Exh. 15 at 4-6, Tr. 178-179, 229, 250-251; the relationships between sea otters and fish, sea urchins, kelp, and other components of the marine ecosystem, Rec. Dec. 87-88, FWS Exh. 17, Tr. 176-177, 181-182, 201, 203-206, 230-232; the conservation, development, and utilization of fishery resources, Rec. Dec. 88, Tr. 144, 175-177, 205-207, 218-220, 278-279; and the feasibility of implementing the present regulations as well as those proposed by the State of Alaska, Rec. Dec. 63-64, 69-70, FWS Exh. 15 at 22, Tr. 148-150, 157-158, 174-175, 180-181, 183-185, 195-198, 200, 213-216, 246.

With respect to population size and OSP, the Service's principal witness on sea otters estimated that the population of the stock is between 100,000 and 140,000 otters. FWS Exh. 15 at 6-16; Tr. 142. This estimate was obtained by dividing the stock into management groups and then adding together the estimates for the individual groups. FWS Exh. 15 at 6. To obtain the estimates, airplane, helicopter, boat, and shore surveys were taken. There was also analysis of size, physical condition, growth rates, incidence of beach dead juveniles, and other data from experimental harvests and transplant programs. FWS Exh. 15 at 7-16. Adjustments were made based on the efficiency of the survey techniques. The efficiency of a technique was evaluated by comparing counts from two or more techniques and by analyzing the effects of known losses to the population in question. FWS Exh. 15 at 6-7. Although the record contains higher estimates, see FWS Exh. 16 at 1, the total estimate of 100,000 to 140,000 otters was accepted by the Marine Mammal Commission as the "best available evidence at this time with which to evaluate the proposed waiver." MMC Exh. 7 at 6, see also Wash. Tr. 247-249. The Director accepts this estimate.

The evidence in the record indicates that the 100,000-140,000 estimate is within the range of the stock's OSP. Approximately half of the suitable sea otter habitat now supports populations that are at or above the carrying capacity level. FWS Exh. 15 at 16. The stock now exists in most of its former range. *Id.* at 17. It is estimated that the present number of sea otters is approximately 75 percent of the total number that would exist in an undisturbed state throughout all of the available habitat in Alaska. *Id.* at 17, Tr. 166. The stock's overall rate of pro-

ductivity is below maximum and declining. FWS Exh. 15 at 17. Although the total population of the stock is still increasing, the rate of increase is decreasing. Tr. 143.

In view of this evidence and other evidence in the record relating to mortality of juveniles, FWS Exh. 15 at 23, Tr. 169-170, reduction in the rate of body growth and body size, FWS Exh. 15 at 23, changes in diet and time budgets, *Id.*, and the otters' birth rate of approximately 20 to 25 percent, Tr. 194, the Service's principal expert on sea otters, the Marine Mammal Commission, and the Administrative Law Judge concluded that the Alaska stock of sea otters is within the range of OSP. FWS Exh. 15 at 17; Tr. 143; Wash. Tr. 252; MMC Exceptions at 1; Rec. Dec. 1, 88, 137. The Director accepts this finding.

Despite his conclusion that the stock as a whole is within the range of OSP, the Administrative Law Judge found that a waiver of the moratorium was appropriate only for the Rat Islands-Delarf Island colony and the Andrenof Islands colony. Rec. Dec. 90. The Judge found that a waiver for the entire stock was "legally inappropriate" because certain colonies within the stock may be below the range of OSP. *Id.*

The Director believes that it is legally permissible to waive the moratorium for the entire stock if the taking authorized by the waiver regulations will not reduce the stock below the range of OSP and will maintain the health and stability of the marine ecosystem. 16 U.S.C. 1361(2), (6), 1373(a), (b)(1); see also, *Committee for Humane Legislation, Inc. v. Richardson supra*. The stock's net annual growth rate was estimated to be between 3 and 5 percent, and rates of 10 to 20 percent appear to be theoretically possible. MMC Exh. 7 at 6-7; Tr. 248. An annual limit of 3,000 for the stock, as suggested by the Marine Mammal Commission, would amount to only 2.14 to 3 percent of the estimated population of 100,000 to 140,000 otters. Thus, a limit of 3,000 otters would permit the stock to continue to increase in population and thereby remain within the range of OSP. However, to insure that sea otters are a significant functioning element throughout their historic range, the taking under the waiver must be restricted to otters from colonies that are themselves within the range of OSP and are not contributing to the repopulation of additional sea otter habitat. Also, the taking must be allocated between such colonies so that it does not exceed 3.5 percent of the population of any one of them. See FWS Exh. 16 at 5; Tr. 239-242; Wash. Tr. 246-247.

Accordingly, the Director finds that it is appropriate to waive the moratori-

um for the entire stock of Alaska sea otters so as to allow the annual taking of 3,000 animals. However, this taking may occur only from colonies that are themselves within the range of OSP and are not contributing to the repopulation of additional sea otter habitat, and in no event may the taking exceed 3.5 percent of the population of any such colony.

Waiver of the Moratorium—Pacific Walrus. After extensive hearings in Alaska and Washington, D.C., in the spring and summer of 1975, regulations were issued which waived the moratorium on the hunting and killing of Pacific walrus. 50 CFR 18.58, 18.94; 40 FR 59459 (Dec. 24, 1975); 41 FR 14373 (April 5, 1976). In addition, management authority for the Pacific walrus has been returned to the State of Alaska pursuant to approval of the State's laws and regulations governing that mammal. 40 FR 59459 (Dec. 24, 1975); 41 FR 14373 (April 5, 1976).

On April 9, 1976, as part of the proposal relating to polar bears and sea otters, the Service published proposed regulations to modify the walrus waiver by extending it to taking other than hunting and killing. 41 FR 15166. However, the annual limit on taking would remain the same, 3,000 animals. *Id.* at 15172. As Administrative Law Judge Littlefield pointed out in his recommended decision, the Service agreed that in modifying the 1976 walrus waiver, it would rely on the record made for that waiver, but other participants could submit additional evidence relating to the status of walrus or to the Alaska or Federal regulations governing the mammal. Rec. Dec. 15.

At the hearings on this modified waiver, the only evidence submitted (other than the record for the 1976 waiver) was a set of answers by the State of Alaska to interrogatories propounded by Monitor, Inc. Neither Exh. 1, Exh. 3. The Administrative Law Judge found the nothing in the State's answers tends to show that the 1976 return of management to the State is in any manner contrary to the mandates of the Act. Rec. Dec. 91. The Judge further concluded that waiver of the moratorium on the taking of Pacific walrus is consistent with the Act. Rec. Dec. 91-92. Since the modified waiver will impose the same annual limit on taking as the 1976 waiver and will also provide more effective protection for Pacific walrus (see section entitled "Description of the Waiver Regulations" *infra*), the Director finds that the modified waiver is appropriate.

Best Scientific Evidence Available. Regulations waiving the moratorium must be based on the "best scientific evidence available." 16 U.S.C. 1371(a)(3)(A), 1373(a). The Environ-

mental Defense Fund, Monitor, Inc., the Marine Mammal Commission, and other participants in this rulemaking have commented on the desirability of further analysis of existing data, the desirability of obtaining more data, and a number of factors which lend uncertainty to the conclusions reached by the experts who testified.

In *Committee for Humane Legislation v. Kreps, supra* at 50, Judge Richey interpreted the "best scientific evidence available" standard to mean "the latest and most up-to-date evidence and knowledge and experience available." During the hearings on these regulations, testimony was received from recognized experts on polar bears and sea otters as well as from a distinguished expert in the field of wildlife population analysis who at the time of his testimony served as Chairman of the Marine Mammal Commission's Committee of Scientific Advisors and who is presently the Chairman of the Commission itself. Rec. Dec. 24-25, 28-29; MMC Exceptions at 6, n.1. The 1976 Pacific walrus waiver regulations were also based on the testimony of recognized experts. Wal. Rec.: Tr. 1088. The data analyzed by these experts was derived from a number of sources and survey techniques. The population estimates and OSP determinations adopted by the Director in these regulations are regarded by the Marine Mammal Commission as being supported by the best scientific evidence available. MMC Br. 1, 9-10; MMC Rep. Br. at 1; MMC Exceptions at 1, 5, 7; MMC Exh. 7 at 6-7, Exh. 8 at 1; Wash. Tr. 232-235, 246, 246-249, 251-252; Wal. Rec.: Tr. 1082-1084, 1088-1089, 1129-1130; MMC Br. 10,39; MMC Rep. Br. 1-2, 13.

The standard of "best scientific evidence available" does not require inaction simply because future studies may develop more data and scientific certainty. In *Committee for Humane Legislation v. Kreps, supra* at 49-50, Judge Richey approved the taking of marine mammals even though he recognized that as of 1977, "[t]he state of research and the state of knowledge with respect to [the] subject matter (of marine mammals) is far from complete, and much remains to be learned and done about marine mammal populations * * *."

Nevertheless, to provide an even greater margin of safety, these regulations accept the recommendation of the Marine Mammal Commission and require that a workshop be held to further obtain and analyze data on polar bears, sea otters, and Pacific walrus. The findings and data from this workshop must be included in the annual report received by the Director from the State of Alaska within 120 days after the close of the first full calendar year following the effective

date of these regulations pursuant to 50 CFR 18.56(b). The waiver regulations for the three mammals will be reevaluated in light of this report. If the report does not contain the findings and data from the workshop, the waiver granted by these regulations for polar bears and sea otters, and modified thereby for Pacific walrus, may be terminated.

Description of the Waiver Regulations. This waiver of the moratorium on the taking of polar bears, sea otters, and Pacific walrus will be governed by these regulations and by the laws and regulations of the State of Alaska. Issuance of these regulations waives the moratorium and these regulations also impose appropriate conditions and limitations on the waiver. The regulations of the State of Alaska, which must be approved by the Director under section 109(a)(2) of the Act, 16 U.S.C. 1379(a)(2), and Subpart F of 50 CFR Part 18, 43 FR 45372, will provide the details of the conservation and management program for the three mammals by prescribing seasons, hunting areas, humane and non-wasteful methods of taking, license and permit requirements, and other management procedures.

The regulations originally proposed by Alaska to implement this waiver were submitted with its 1973 request for a return of management authority over the mammals. The 1973 proposal is contained in Appendix D to the draft environmental impact statement for the waiver. In August of 1975, Alaska submitted revised regulations for the mammals. The 1975 regulations are set forth in Appendix G to the draft impact statement and also in Appendix G to the final impact statement. In its comments in 1977 on the recommended decision for the waiver, Alaska indicated that it intended to submit another set of regulations for the three mammals. Alaska Comments at 9 10.

In view of the State's intention to submit new regulations, the Director will not make a consistency determination on the 1975 revision. Instead, Alaska's new regulations will be reviewed once they are received. The Federal regulations published herein will not be effective unless Alaska's regulations are approved.

These Federal regulations will be codified in 50 CFR 18.92-18.95. Section 18.92 defines a number of important terms used in these regulations. The definitions prescribed in § 18.92 will be discussed in the description of other sections.

Section 18.93 waives the moratorium on the taking of sea otters by allowing them to be taken in Alaska. Section 18.92(a) defines "Alaska" as all lands within the State of Alaska and all

waters within the State's three-mile seaward boundary. Because the Fur Seal Act, 16 U.S.C. 1171(a), prohibits the taking of sea otters on the high seas, the moratorium remains in effect beyond the seaward boundary of the State of Alaska.

Section 18.93 also waives the moratorium on the taking of polar bears and Pacific walrus by allowing them to be taken in Alaska or the "waters off Alaska". Section 18.92(f) defines "waters off Alaska" to include certain waters beyond "Alaska" (as that term is defined in § 18.92(a)).

Section 18.94 limits the extent of the waiver by imposing a number of conditions on it. Section 18.94(a) provides that the moratorium is waived only for taking by persons, residents or non-residents, who are subject to the jurisdiction of the State of Alaska. Because the State of Alaska must administer the conservation and management program for the mammals concerned, these regulations do not allow taking by persons who are not subject to the State's jurisdiction. Consequently, § 18.94(a) further provides that all taking allowed by these regulations must comply with the laws and regulations of the State of Alaska.

Section 18.94 imposes an annual limit on the number of animals that may be taken from each stock. This annual limit is the aggregate number for the stock. The limit must be apportioned between individual takers and groups of takers in a manner consistent with sound principles of conservation and management.

The annual limit for each stock is the total number of animals that may be removed from the natural habitat in any calendar year as a result of all takings. Section 18.92(e) defines "removed from the natural habitat" to mean that the animal has been killed and retrieved, or has been captured for purposes other than immediate return to the natural habitat. Thus, for example, animals captured for tagging or marking will not count against the annual limit unless they are killed or seriously injured in the process. Section 18.92(d) defines "natural habitat" to mean the habitat in which the animal lives as a wild animal. The Director believes that removal from the natural habitat is the best measure for the annual limit in view of the Act's primary purposes to protect and maintain the health and stability of wild populations and the ecosystems of which they form essential parts, 16 U.S.C. 1361(2), (6), 1362(8)-(9), 1373(a).

Because the record for these regulations indicates that an undetermined, but possibly considerable, number of polar bears and Pacific walrus are being killed unlawfully for their valuable hides and ivory, respectively, and that activities associated with oil ex-

ploration and development pose a significant threat to polar bears, walrus, and sea otters, MMC Exh. 4 at 2, Tr. 38-39, 69-71, 85, 87, 150, 198-200, Walrus Rec.: Tr. 107, 149, 669-670, 675, 682-686, 697-698, 916-917, the Director believes that the annual limits must include the number of animals removed from the natural habitat as a result of unlawful taking and incidental taking. Including illegally killed animals in the annual limit will create an incentive for improved enforcement efforts, since for each animal killed unlawfully, one less may be killed lawfully. Likewise, including animals killed incidentally as a result of fishing, oil development, and other activities will create an incentive for reducing such incidental taking, since for each animal killed incidentally, one less may be killed directly.

Because there are two stocks of polar bears, each stock has its own annual limit. See previous discussion under "Waiver of the Moratorium—Polar Bears." To insure that sea otters are a significant functioning element throughout their historic range, protection must be given to each individual colony. Thus, § 18.94(h)-(i) provides that sea otters may be taken only from colonies which are themselves within the range of OSP and are not contributing to the repopulation of other areas, and that the annual limit for each such colony may not exceed 3.5 percent of its population.

Under § 18.94(j), the annual limit for Pacific walrus is 3,000 animals. To mitigate the problem of animals killed but not retrieved, § 18.94(l) provides that any person who kills or injures any walrus, bear, or sea otter must immediately make a reasonable effort to retrieve or capture such mammal.

Section 18.94 also imposes a number of other conditions on the waiver. To facilitate enforcement, § 18.94(m) establishes certain marking and tagging requirements for mammals taken under these regulations. Section 18.94(n) provides for either suspension of taking or reimposition of the moratorium if it appears likely that the annual limit for any stock or colony may be exceeded. Section 18.94(o) provides that the Director will take all appropriate action to terminate any taking found to be inconsistent with the Act or its regulations, including, if necessary, reimposition of the moratorium. Section 18.94(p) establishes the workshop requirement described previously in the section entitled "Best Scientific Evidence Available."

Section 18.95(a) requires that any taking allowed by the waiver be authorized by a written license or permit issued by the State of Alaska.

Under the Act, permits for scientific research or public display may be issued without a waiver of the morato-

rium. 16 U.S.C. 1371(a)(1). The Act's legislative history indicates that Congress contemplated that after return of management authority to a State pursuant to approval of its laws, such State could assign scientific research or public display permits to qualified persons in accordance with the provisions of a general permit for scientific research or public display issued to the State by the Secretary. Conference Report at 26. Accordingly, § 18.95(b) provides that the State of Alaska may assign scientific research or public display permits to qualified persons in accordance with the terms of a general permit issued to the State by the Service. Since the Service may also be issuing a limited number of scientific research or public display permits and since removals from the natural habitat under either Alaska or Service permits will count against the annual limit for the stock or colony, it is imperative that responsible State and Service officials keep each other informed of the number of permits issued in order to insure that the annual limit is not exceeded.

Finally, for purposes of clarity, these regulations make a number of changes in the organization and wording of the proposed rules published on April 9, 1976, 41 FR 15166. Also, these regulations omit certain paragraphs in the proposed rules concerning enforcement provisions for polar bear hides. Similar provisions will be contained in the laws and regulations of the State of Alaska, and the State will also prescribe additional requirements to facilitate enforcement.

The Act's Native Exemption. The Director adopts the conclusion of the Administrative Law Judge that the State of Alaska may regulate the taking of marine mammals by Alaska natives for subsistence, handicraft, or clothing purposes after a waiver of the moratorium and return of management authority to the State. The Director does not adopt the Judge's conclusion or rationale to the extent they suggest or imply that Alaska may not regulate native taking for such purposes before a waiver and return of management authority or that a waiver and return of management authority are necessary prerequisites to the States regulation of native taking.

It is the Director's view that the Act did not totally preempt State jurisdiction over Alaska natives. Section 101(b) of the Act, 16 U.S.C. 1371(b), states that "the provisions of this Act shall not apply" with respect to non-wasteful takings of non-depleted species of marine mammals by Alaska natives for subsistence, handicraft, or clothing purposes. Section 109(a)(1), 16 U.S.C. 1379(a)(1), which provides that "no State may adopt any law or regulation relating to the taking of

marine mammals," is one such provision that "shall not apply" under the terms of Section 101(b). Thus, the Act did not preempt State law governing Alaska native takings unless the species are depleted, the takings are wasteful, or the takings are for purposes other than handicrafts, clothing, or subsistence. Congress left native handicraft, clothing, and subsistence taking exactly as it was before the Act, regulated by the State of Alaska. While native subsistence taking evidently is preferred to other kinds of taking under the Act, the Director does not regard this preference as overriding the Act's policy of protecting marine mammals.

These regulations are issued under the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407. They were prepared by Ronald Swan, Office of the Solicitor, Department of the Interior.

Dated: January 4, 1979.

KEITH M. SCHREINER,
Acting Director.

Accordingly, Part 18 of Title 50, Code of Federal Regulations, is amended as set forth below:

1. Subpart H of the Table of Contents is revised to read as follows:

Subpart H—Waiver of the Moratorium on the Taking of Polar Bears, Sea Otters, and Pacific Walruses in Alaska or the Waters Off Alaska

Sec.

- 18.92 Definitions.
- 18.93 Waiver of the moratorium.
- 18.94 Conditions of the waiver.
- 18.95 Permits.

AUTHORITY: Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407.

Subpart H—Waiver of the Moratorium on the Taking of Polar Bears, Sea Otters, and Pacific Walruses in Alaska or the Waters Off Alaska

2. Subpart H is revised to read as follows:

§ 18.92 Definitions.

As used in this Subpart H:

- (a) "Alaska" means all lands within the State of Alaska and all waters within the seaward boundary of the State of Alaska;
- (b) "Colony" means a group of sea otters found in a common area that is isolated by a body of water or other physical barrier which impedes, but does not prevent, genetic interchange with sea otters outside the common area;
- (c) "Optimum sustainable population" means a population size which falls within a range from the population level of a given species, stock, or, in the case of sea otters, colony which

is the largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality;

(d) "Natural habitat" means the habitat in which a marine mammal lives as a wild animal;

(e) "Removed from the natural habitat" means that the animal has been killed and retrieved, or has been captured for purposes other than immediate return to the natural habitat;

(f) "Waters off Alaska" means waters outside Alaska, and west of longitude 130 degrees West, north of latitude 50 degrees North, east of the Convention Line of 1867 between the United States and the Union of Soviet Socialist Republics, and south of latitude 75 degrees North.

§ 18.93 Waiver of the moratorium.

Subject to the provisions of this Subpart H, sea otters may be taken in Alaska and polar bears and Pacific walruses may be taken in Alaska or the waters off Alaska.

§ 18.94 Conditions of the Waiver.

(a) Any taking allowed by this Subpart H may be done only by a person who is subject to the jurisdiction of the State of Alaska and must comply with the laws and regulations of the State of Alaska.

(b) The total number of polar bears which may be removed from the natural habitat in Alaska and waters off Alaska, in the area east of a line extending northwest and southeast from Point Lay, Alaska, in any calendar year is 55.

(c) The total number of polar bears which may be removed from the natural habitat in Alaska and waters off Alaska, in the area west of a line extending northwest and southeast from Point Lay, Alaska, in any calendar year is 115.

(d) No polar bear less than 28 months of age may be taken.

(e) No female polar bear that is accompanied by a polar bear less than 28 months of age may be taken.

(f) No polar bear may be taken in a den.

(g) Subject to the conditions set forth in paragraph (h) and (i) of this section, the total number of sea otters which may be removed from the natural habitat in Alaska in any calendar year is 3,000.

(h) The total number of sea otters which may be removed from the natural habitat of any colony in any calendar year may not exceed 3.5 percent of the population of that colony.

(i) No sea otter may be taken from any colony which is below its optimum sustainable population or from which sea otters are moving to other areas of natural habitat which they are establishing new colonies.

(j) The total number of Pacific walrus which may be removed from the natural habitat in Alaska and waters off Alaska in any calendar year is 3,000.

(k) The annual limits established by paragraphs (b), (c), (g), (h), and (j) of this section include all polar bears, sea otters, or Pacific walrus that have been removed from the natural habitat during any calendar year as a result of taking for subsistence, handicraft, or clothing purposes, incidental taking, unlawful taking, taking authorized by the Service or the State of Alaska under §§ 18.31 or 18.95(b) pursuant to a permit for scientific research or public display, and all other taking authorized by the laws and regulations of the State of Alaska.

(l) Any person who kills or injures any polar bear, sea otter, or Pacific walrus must immediately make a reasonable effort to retrieve or capture such marine mammal.

(m) No marine mammal taken under this Subpart H or under § 18.31, and no part or product of any such marine mammal, may be transported out of Alaska or the waters off Alaska unless it is first marked, tagged, or otherwise identified in accordance with the laws and regulations of the State of Alaska, and any such mark, tag, or identification shall remain on such marine mammal, or part or product thereof, until completion of any tanning, taxidermy work, or other processing.

(n) Whenever 80 percent of an annual limit established by paragraph (b), (c), (g), (h), or (j) of this section is reached, the State of Alaska must immediately so inform the Director pursuant to § 18.57. After notifying the Director, the State of Alaska must take all necessary measures to insure that such annual limit is not exceeded. If the Director determines that the State of Alaska has not insured that the annual limit will not be exceeded, he may, by regulation, prohibit any further taking during the calendar year in question or repeal this Subpart H and thereby reimpose the moratorium on taking established by section 101(a) of the Act, 16 U.S.C. 1371(a).

(o) Whenever the Director determines that any taking of polar bears, sea otters, or Pacific walrus is not consistent with the Act, this Subpart H, or any other regulation issued under the Act, he shall take all appropriate action to terminate such taking, including, if necessary, issuance of regulations to repeal this Subpart H and thereby reimpose the moratorium on

taking established by section 101(a) of the Act, 16 U.S.C. 1371(a).

(p) If the Director does not receive from the State of Alaska within 120 days after the close of the first full calendar year following the effective date of this Subpart H an annual report submitted under § 18.56(b) which contains the findings and data of a workshop held to obtain and analyze data on polar bears, sea otters, and Pacific walrus, he may, by regulation, repeal this Subpart H and thereby reimpose the moratorium on taking established by section 101(a) of the Act, 16 U.S.C. 1371(a).

§ 18.95 Permits.

(a) Any taking allowed by this Subpart H must be authorized in writing by the State of Alaska.

(b) In addition to licenses or permits referred to in paragraph (a) of this section, the State of Alaska, in accordance with the provisions of a general permit for scientific research or public display issued to the State under § 18.31, may assign to qualified persons permits for scientific research or public display.

[FR Doc. 79-959 Filed 1-10-79; 8:45 am]

[3510-22-M]

CHAPTER II—NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

Alaska Waiver

AGENCY: National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Determination of Alaska Waiver Request; Final Rule.

SUMMARY: Under the authority of the Marine Mammal Protection Act of 1972 (the "Act"), the Administrator of the National Oceanic and Atmospheric Administration (NOAA), (the "Administrator"), has determined that it is appropriate to waive conditionally the requirements of the Act to allow the taking of certain Alaska marine mammals and to promulgate regulations implementing the waiver. The waiver and its implementing regulations will not become effective until management of these marine mammals has been returned to Alaska, following a determination that the State's laws and regulations are consistent with this decision and the Act's purposes and policies.

DATE: The waiver and accompanying Federal regulations will not be effective until the Administrator subsequently determines (in accordance with Section 109(a)(2) of the Act and 50 CFR Part 216, Subpart H) that Alaskan laws and regulations are consistent with the Act.

ADDRESS: Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, Washington, D.C. 20235.

FOR FURTHER INFORMATION CONTACT:

William P. Jensen, Marine Mammal Program Manager, Office of Marine Mammal and Endangered Species, National Marine Fisheries Service, 3300 Whitehaven St., NW, Washington, D.C. 20235. Telephone: 202-634-7461.

SUPPLEMENTARY INFORMATION:

On January 31, 1973, the Governor of Alaska requested the Secretary of Commerce to return to the State of Alaska the management of the following marine mammals in accordance with Section 109(a)(2) of the Act: Northern (Steller) sea lion, *Eumetopias jubatus*; land-breeding harbor seal, *Phoca vitulina*; ice-breeding harbor seal, also known as spotted or largha seal, *Phoca largha*; ringed seal, *Pusa hispida*; ribbon seal, *Histriophoca fasciata*; Pacific bearded seal, *Erignathus barbatus*; and beluga whale, *Delphinapterus leucas*. Because the Act divided jurisdiction over marine mammals between the Departments of Commerce and the Interior, the Governor made a similar request to the Secretary of the Interior regarding a waiver and return of management of the polar bear, *Ursus maritimus*; sea otter, *Enhydra lutris*; and Pacific walrus, *Odobenus rosmarus*.

On April 9, 1976, the Directors of the National Marine Fisheries Service (NMFS)¹ and the U.S. Fish and Wildlife Service (FWS), acting on behalf of the Secretaries of Commerce and the Interior, respectively, proposes to waive the moratorium with respect to the marine mammals under their jurisdictions (41 FR 15166, 15173). Simultaneously, NMFS and FWS published proposed regulations and statements in accordance with Section 103(d) of the Act to implement the waiver subject to a determination that

¹At the time of proposal, the authority of the Secretary of Commerce to issue final regulations and decide on a waiver of the moratorium and return of management had been delegated to the Administrator of the National Oceanic and Atmospheric Administration who in turn had delegated his authority to the Director of NMFS. This delegation was changed on November 4, 1977, to return this authority to the Administrator of the National Oceanic and Atmospheric Administration.

Alaska's laws and regulations are consistent with the Act.²

A joint Draft Environmental Impact Statement (DEIS) filed on March 5, 1976, was made available to Federal Agencies and the general public for comment. Comments were received from the Department of Agriculture, Department of the Interior, California Department of Fish and Game, Alaska Department of Environmental Conservation, State of Oregon, Washington State Department of Game, National Fisheries Institute, University of Alaska, Alaska Professional Hunters Association, Bering Straits Native Corporation, Nunam Kitlutsisti, Environmental Defense Fund, National Parks and Conservation Association, Committee for Humane Legislation, Society for Animal Protective Legislation, National Wildlife Federation, Safari Club International, and the Wildlife Society. A Final Environmental Impact Statement (FEIS) was filed on March 27, 1978.

In accordance with Section 103(d) of the Act, the proposals were subject to a hearing on the record, presided over by an Administrative Law Judge (ALJ). The ALJ's prehearing order of May 28, 1976 (41 FR 21832) listed 17 issues to be considered during the hearing which took place as follows: Anchorage, Alaska (June 29-July 1, 1976); Nome, Alaska (July 6-9, 1976); Bethel, Alaska (July 12-13, 1976); Anchorage, Alaska (July 14-20, 1976); Washington, D.C. (October 19-20, 1976). The following parties made appearances in the hearing: State of Alaska; FWS; NMFS; Marine Mammal Commission; National Fisheries Institute, Inc.; Committee for Humane Legislation, Inc.; Friends of Animals, Inc.; Environmental Defense Fund; Monitor Inc.; Nunam Kitlutsisti; Alaska Legal Service Corps (on behalf of various Natives and Native groups); Savoonga and Gambell Native Corporation; and Maneluk Association.

The availability of the ALJ's recommended decision was announced on July 20, 1977 (42 FR 37215) accompanied by a summary of his recommended decision. The public was asked to comment and responses from the following were received: Monitor Inc.; Environmental Defense Fund; Friends of Animals; Committee for Humane Legislation; State of Alaska; Marine Mammal Commission; International Association of Fish and Wildlife Agencies; Animal Care and Welfare Inc.; Safari International; Ms. Susan T. Peschka; Ms. Judi Stephens; and Mrs. E. M. T. Moore.

²On April 5, 1976, the Secretary of the Interior in a separate action waived the moratorium on walrus and returned management to Alaska with the understanding that the walrus waiver and return of management would be reconsidered in the instant proceeding.

SUMMARY OF ALJ'S DECISION

The Administrative Law Judge's recommended decision contains the following important findings of fact and conclusions of law:

1. The ALJ found that the best scientific evidence available was presented at the hearings in support of the proposed waiver of the moratorium.

2. The ALJ concluded that optimum sustainable population (OSP) constitutes a range of population sizes from a point somewhat above the point of maximum productivity up to the carrying capacity of the habitat.

3. Notwithstanding the exemption from the moratorium provided for Alaskan natives under Section 101(b) of the Act, regarding the taking of marine mammals for subsistence purposes, for native handicraft purposes, and for non-wasteful takings, the ALJ concluded that the State may, upon a waiver and return of management, regulate all hunting of marine mammals by natives. The ALJ seemed to suggest that the legislative intent was to exempt natives only from the moratorium and that once the moratorium was waived, so was the exemption.

4. Consistent with the preliminary findings of NMFS in the preamble of the April 9, 1976, proposal to waive the moratorium, the ALJ found that Alaska beluga whales are comprised of two population stocks, one located in the Cook Inlet-Shelikoff Strait and the other located in the Bering Sea-Chukchi Sea, but there is only one stock each of land-breeding harbor seals, ice-breeding harbor seals (largha or spotted seals), ribbon seals, bearded seals, ringed seals, and sea lions in Alaska.

5. The ALJ concluded that the proponents of the waiver have satisfied the burden of proof in establishing that each stock is within the range of OSP.

6. The ALJ found that a waiver and return of management to the State was beneficial and without it, there would be little if any management of marine mammals in general and of native taking in particular. The ALJ believed that management was needed to maintain healthy populations of the subject marine mammals and that none now exists.

7. The ALJ found that Alaska had a modern scientific resource program and that the waiver of the moratorium and implementation of Alaska's program would be in accord with sound principles of resource protection and conservation, including research, enforcement, census, habitat acquisition and improvement, and public participation in the development of game regulations.

8. The ALJ also determined that the proposed Federal regulations were adequate to protect the subject marine

mammals; and, that the suggested State regulations met the criteria set forth in the Federal regulations and the Act, protected the subject marine mammals, and should be approved.

9. With respect to the Department of Commerce species, the ALJ accepted the following population estimate for each of the stocks involved:

- (a) Northern sea lion—214,000;
- (b) Beluga whale (Cook Inlet stock)—500;
- (c) Beluga whale (Bering-Chukchi Sea stock)—9,000;
- (d) Land-breeding harbor seal—270,000;
- (e) Ice-breeding harbor seal—200,000 to 250,000;
- (f) Ringed seal—1 million to 1.5 million;
- (g) Ribbon seal—90,000 to 100,000; and
- (h) Pacific bearded seal—300,000 to 400,000.

10. With respect to the Department of Commerce species, the ALJ found that it was appropriate to waive section 101(a) of the Act to permit the following annual taking limits and that such limits would protect the stocks from being disadvantaged under the terms of a waiver and return of management:

(a) Northern sea lion—The ALJ recommended setting an annual taking limit of 6,648 adults, providing that two pups could be taken in lieu of each adult covered by the limit.

(b) Beluga whale (Cook Inlet stock)—The ALJ concluded that an annual taking limit of 10 belugas would not disadvantage the stock.

(c) Beluga whale (Bering-Chukchi Sea stock)—The ALJ concluded that an annual taking limit of 350 belugas would not disadvantage the stock.

(d) Land-breeding harbor seal—The ALJ found that the annual taking limit of land-breeding harbor seal adults should not exceed 8,461 seals. However, in light of the high natural mortality of pups, he further found that two pups could be safely taken in lieu of one adult animal. He added that there should be no taking from the sub-populations in the Outer Kenai Coast, Management Area 2, and the Kodiak Archipelago, Management Area 3, where there has been heavy exploitation in the past.

(e) Ice-breeding harbor seal—The ALJ found that an annual taking limit of 5,700 animals would be appropriate to avoid disadvantage to the stock.

(f) Ringed seal—The ALJ found that an annual taking limit of 20,000 ringed seals would not disadvantage the stock.

(g) Ribbon seal—The ALJ found that an annual taking limit of 500 ribbon seals would not disadvantage the stock.

(h) Pacific bearded seal—The ALJ found that an annual taking limit of 4000 Pacific bearded seals would not disadvantage the stock.

The ALJ was assured that all of these takings were in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the Act. The ALJ indicated that before the waiver and a return of management is effected, the State of Alaska should develop detailed regulations which incorporate, as applicable to the Department of Commerce species, the following points:

1. Subsistence takers should be given preference over sport and commercial hunters, and "subsistence taker" should be defined on the basis of bona fide dependence on marine mammals by coastal residents.

2. The State should exercise extreme caution and prudence, allowing margins for safety, in calculating harvest levels.

3. To prevent the Federal waiver limit from becoming a target, lower figures should be published within the State as harvest quotas, and quotas should be set not only for the total area of the State, but also for each region or village.

4. Persons who conduct commercial harvests should be required to submit jaw and reproductive tract specimens for analysis and research.

5. The State regulations should include specific language corresponding to that in the Act using the standard of OSP.

6. A working arrangement for enforcement of the marine mammal laws should be negotiated between the State of Alaska and the U.S. Coast Guard.

7. A cooperative agreement concerning marine mammal enforcement monitoring and review should be negotiated between FWS and NMFS.

8. A working partnership should be established between the Native community and the State concerning proposed regulations bearing on Native communities. The ALJ strongly urged that the State provide translations of its proposals so that affected Native communities can be fully informed.

9. Proposed changes in laws, regulations, policies, and permits by the State of Alaska should be published in the FEDERAL REGISTER to allow non-Alaskan participation in such changes.

10. Whenever seals are to be taken by clubbing, clubbers should be trained, stickers and a backup staff should be used, and seals should be grouped together.

11. The State method for selecting hearing officers in civil prosecution should not be employed for civil prosecutions under Alaska's approved marine mammal regulations. Rather,

U.S. Administrative Law Judges should be retained and assigned through the U.S. Civil Service Commission on a case by case basis with reimbursement being made to the U.S. Government.

12. Even after a return of management, programs for continued research and analysis should be pursued to improve the management effort.

13. The ALJ noted that several witnesses had testified that the State system made it difficult for Natives to serve as guides; therefore, most of the profit went to non-Native brokers in Anchorage. This problem should be resolved through appropriate means.

14. Regulations should provide for the furnishing of necessary data and other information from the State of Alaska to the Marine Mammal Commission.

CONSIDERATION OF THE ALJ'S RECOMMENDED DECISION

I have thoroughly reviewed the recommended decision of the ALJ, the record of the hearing upon which it is based, and all comments received after publication of the notice of its availability. I hereby adopt and incorporate by reference the ALJ's decision, except as noted below. In each instance where I make a specific determination, I will refer to the ALJ's decision and indicate whether I adopt both his decision and underlying rationale. Where I concur in his decision but wish to modify or add to his rationale, I will make appropriate comments.

STATUTORY BASIS FOR DETERMINATIONS

Section 101(a)(3)(A) of the Act provides that a waiver decision must be made on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, giving due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of the marine mammals in question. Also, I must be assured that the taking of these mammals is in accord with sound principles of resource protection and conservation provided in the purposes and policies of this Act.

Section 103 of the Act provides that regulations allowing the taking of marine mammals must be based on the best scientific evidence available and in consultation with the Marine Mammal Commission. I must insure that the taking allowed under the regulations will not be to the disadvantage³ of the species and population

³Although not defined in the Act, I find for purposes of this determination that "disadvantaged" refers to species or population stocks below or above OSP or subject to conditions that do not preserve the purposes and policies of the Act or do not maintain optimum sustainable population and a healthy ecosystem.

stocks in question and will be consistent with the purposes and policies of section 2 of the Act. The regulations implementing the waiver of the moratorium must not permit the subject species and population stocks to diminish beyond the point at which they cease to be a functioning element in the ecosystem of which they are a part or to diminish below their optimum sustainable population. Management of these species and population stocks must be to maintain the health and stability of the marine ecosystem.

Section 109(a)(2) of the Act provides for a return of management of marine mammals to any State if the Administrator determines that the State's laws and regulations will be consistent with regulations promulgated under Section 103 of the Act with respect to the subject species and population stocks and with other applicable provisions of the Act. Section 109(a)(3) requires the Administrator to monitor continuously the laws and regulations of the state to which management has been returned to determine whether they are in substantial compliance with this section of the Act.

DETERMINATIONS

Under Section 101(a)(3)(A) of the Act, I have determined that it is appropriate to effect a waiver and allow the taking of certain marine mammals to the extent indicated below; and, to promulgate regulations implementing the waiver pursuant to section 103(a) of the Act. However, at this time I am unable to make a determination that Alaska's laws and regulations are consistent or inconsistent with the Act and, consequently, I cannot return management of these mammals to the State. The waiver and accompanying regulations will not be effective and management will not be returned until Alaska makes appropriate changes to its laws and regulations, submits them to me, and they are approved in accordance with the policies, criteria, and procedures outlined in 50 CFR Part 216, Subpart H. To assist the State in this effort, certain changes I deem appropriate and necessary are stated herein.

CONSULTATION

My actions under Sections 101 and 103 of the Act require consultation with the Marine Mammal Commission. The Commission was consulted prior to publication of the proposal and the DEIS and was a party to the administrative proceedings. The Commission also submitted comments on the ALJ's recommended decision. It is my conclusion, therefore, that the consultative requirements of the Act have been satisfied.

BEST SCIENTIFIC EVIDENCE AVAILABLE

My actions under Sections 101 and 103 also must be based on the "best scientific evidence available." The ALJ found that the best scientific evidence available was presented at the hearing in support of the proposed waiver of the moratorium.

A major point of contention raised by some opponents to the proposed waiver was that the scientific evidence did not meet this standard. In final briefs, certain parties argued that the waiver should not be granted until "greater scientific certainty" is attained. However, by using the phrase "best scientific evidence available"

rather than "best scientific evidence possible," the Act provides that scientific certainty is not required. I believe that the evidence in the record is sufficient to permit the conservative decision I have taken and that my decision will not disadvantage the populations involved.

POPULATION STOCK AND LEVELS

Each species in question is represented by a single stock in Alaska and the waters off Alaska except for the beluga whale which has two stocks. The population estimates for these species, based on the best scientific evidence available, are as follows:

Species	Estimated population level
Northern sea lion (<i>Eumetopias jubatus</i>)	214,000
Harbor seal (<i>Phoca vitulina</i>)	270,000
Largha seal (<i>Phoca largha</i>)	200,000 to 250,000
Ringed seal (<i>Pusa hispida</i>)	1.0 million to 1.5 million
Ribbon seal (<i>Phoca fasciata</i>)	90,000 to 100,000
Bearded seal (<i>Erignathus barbatus</i>)	300,000
Beluga whale (<i>Delphinapterus leucas</i>):	
Cook Inlet stock	500
Bering/Chukchi Sea stock	9,000

The ALJ and Marine Mammal Commission concur with the foregoing number of stocks and population levels.

OPTIMUM SUSTAINABLE POPULATION

A major issue in the hearing was the expected impact of the waiver and accompanying regulations on the optimum sustainable population (OSP) of each species or population stock in question. It is my duty to determine OSP for each species or population stock and to be assured that the waiver and accompanying regulations will maintain populations at OSP levels.

On December 21, 1976 (41 FR 55536), NMFS published a definition of OSP as follows: "Optimum sustainable population is a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and growth less losses due to natural mortality." Maximum net productivity is defined as the lower limit of the range of OSP.

This definition was approved by the Director of NMFS as a result of the formal hearing in the tuna-porpoise controversy. (MMPAH #2-1976). It was promulgated before the close of

the administrative record herein and was discussed by various parties. It was approved by Judge Richey of the U.S. District Court for the District of Columbia in *Committee for Humane Legislation v. Kreps*, D.D.C., Civ. Action No. 77-0564, Order of the Court dated June 30, 1977 (transcript pp. 41-51).

The ALJ concluded that OSP constitutes a range of population sizes from an undefined point somewhat above the point of maximum productivity up to the average carrying capacity of the habitat. He noted that "maximum productivity" is not defined in the Act and he did not address specifically the NMFS refinement of that term discussed above, even though the NMFS definition was in the record and discussed by many parties and witnesses.

I disagree with the ALJ's definition because it does not define clearly the lower end of the range of OSP. In addition, the NMFS definition more accurately reflects the dynamics of marine mammal populations and is supported by expert testimony in the hearing. The NMFS definition clearly defines the lower end of the range of OSP and allows consideration of all factors which pertain to the health of the ecosystem and the functioning of a species or population stock in the ecosystem. OSP may be evaluated in terms of numbers of animals and it also may be evaluated by reference to scientific indicators of the health and vitality of a species or population stock such as historical population

levels, population trends, distribution, habitat, relative density, mortality rates, reproductive rates, age composition, and other behavioral characteristics. The record contains much evidence about these factors and their use in evaluating OSP for each of the subject species and population stocks.

Because of the prior administrative decision, the recent judicial approval of this NMFS definition and my in-depth review of the record, I do not accept the ALJ's definition of OSP and find that the NMFS definition is correct.

After careful review of the expert testimony, the ALJ's review of the various ecological factors, and, especially, the views of the Marine Mammal Commission, I adopt the ALJ's recommendation that each of the subject species or population stocks is within the range of OSP.

EXTENT OF THE WAIVER

The waiver of the moratorium and the numerical, annual taking limits pertain to the following: takings of marine mammals in Alaska and in the waters off Alaska: subsistence taking by Alaskan natives; and direct taking, incidental taking, and lethal scientific research by all U.S. citizens and residents, including Alaskan natives, Alaskan citizens, and resident aliens.

The annual taking limits do not pertain to taking for non-lethal scientific research (e.g. tagging), taking for public display purposes, and all taking by foreign persons and vessels. These will remain under NOAA control and operate outside the waiver.

After a consistency determination under Section 109(a)(2) of the Act and 50 CFR Part 216, Subpart H, the waiver and other legal authority will give Alaska control over all takings except direct taking, incidental taking, and lethal scientific research by non-Alaskan, U.S. citizens and residents in the waters off Alaska. These will remain under NOAA supervision, with Alaska's consultation required before any permit is issued.

1. *Northern Sea Lion*. I adopt the ALJ's recommendation of an annual taking limit of 6,648 adults and, with modification, adopt the recommendation of the MMC and ALJ allowing the taking of two pups in lieu of one adult. The MMC recommended an annual taking limit of 7,800 adults.

The evidence supports an exception for the taking of pups because of their high natural mortality, but I believe that this should be allowed only under very narrow circumstances. Consequently, I have determined that two pups can be taken in lieu of one adult only in commercial harvests, which will be operated under strict State con-

trols, and that the State must establish the maximum age for pups that qualify for this exception (based on the age of pups subject to very high natural mortality.) Animals born in the year in which they are harvested are considered pups.

2. *Land-breeding Harbor Seal.* I do not adopt the ALJ's recommendation of an annual taking limit of 8,461 adults, allowing the taking of two pups in lieu of one adult, prohibiting any take in certain areas, and allowing only a pup harvest in other areas. The MMC recommended an annual taking limit of 10,800 adults and recognized that two pups could be taken in lieu of one adult.

I have determined that the annual taking limit should be 10,511 adults and although the record indicates that two pups can be taken in lieu of one adult, this exception must be limited as indicated in my discussion of the preceding species. Two pups can be taken in lieu of one adult, but only in commercial harvests and according to maximum age restrictions established by the State (based on the age of pups subject to very high natural mortality).

Although I appreciate the ALJ's recommendation that no taking occur in certain areas, there is evidence in the record that these particular groups of seals are not depressed. In my view, if such a restriction is necessary, it cannot be implemented effectively through the waiver process. Rather, Alaska should impose this restriction, where necessary, through its game management procedures.

Moreover, the evidence indicates, and the ALJ found, that there is one stock of land-breeding harbor seals and that it is within OSP. It is likely that neighboring groups of seals will contribute to the "recovery" of seals in any areas where groups are depressed. The annual taking limit is directed at the number of animals that can be taken from the entire stock. If the state adopts a management approach that is not conservative and does not wisely distribute any harvest, I have reserved the power to correct the situation (see 50 CFR 216.113(e) and 216.113(f)).

The appropriateness of a pup harvest is also a matter to be resolved by the State through its management procedures, but as indicated above, pups can be taken only in limited circumstances.

3. *Ice-breeding (Spotted or Larcha) Harbor Seal.* I adopt the ALJ's recommendation of an annual taking limit of 5,700 ice-breeding harbor seals. The MMC recommended that annual U.S. taking be limited to 5,700 larcha seals.

4. *Ringed Seal.* I adopt the ALJ's recommendation of an annual taking limit of 20,000 ringed seals. The MMC

recommended that annual U.S. taking be limited to 20,000 ringed seals.

5. *Ribbon Seal.* I adopt the ALJ's recommended annual taking limit of 500 ribbon seals. The MMC recommended that annual U.S. taking be limited to 500 ribbon seals.

6. *Pacific Bearded Seal.* I do not adopt the ALJ's recommended limit of 4,000 bearded seals returned to shore. The MMC recommended that annual U.S. taking be limited to 9,000 bearded seals. The record indicates a high loss rate for this species, perhaps as high as two to one. The ALJ's recommendation might, if implemented, result in as many as 12,000 seals killed annually. Until better data on loss rate are obtained, I have determined that the annual take limit for Pacific bearded should be 9,000 animals, to be measured by the landing and taking ashore of 3,000 animals.

7. *Beluga whale.* Two stocks of beluga whales are recognized in Alaskan waters, the Cook Inlet stock and the Bering-Chukchi Sea stock. I adopt the ALJ's recommended annual taking limit of 10 whales from the Cook Inlet stock and 350 whales from the Bering-Chukchi sea stock. The MMC recommended that total annual U.S. taking be limited to 360 beluga whales.

After careful review of the record and, in particular, the views of the Marine Mammal Commission, I have determined that all subject species and population stocks are within OSP and will not be disadvantaged or reduced below OSP as a result of conditionally waiving the moratorium to the extent determined above. Therefore, the waiver is in accordance with the principles of resource protection and conservation provided by the purposes and policies of the Act.

NATIVE EXEMPTION

I adopt the ALJ's conclusion that the State of Alaska can regulate subsistence hunting of marine mammals by Alaskan natives after a waiver and return of management to the State. I do not adopt his conclusion or rationale to the extent they suggest or imply that Alaska cannot regulate native subsistence hunting prior to a waiver and return of management or that a waiver and return of management are necessary prerequisites to State regulation of native subsistence hunting.

It is my view that the Act did not totally preempt state jurisdiction over Alaskan natives. Section 101(b) states that "the provisions of this Chapter shall not apply" with respect to non-wasteful takings of non-depleted species of marine mammals by Alaskan natives for subsistence and handicraft purposes. Section 109(a)(1), which provides that "no State may adopt any law or regulation relating to the taking of marine mammals," is one

such provision that "shall not apply" under the terms of Section 101(b). The Act did not preempt State law governing Alaskan native takings unless the species are depleted, the takings are wasteful, or the takings are for purposes other than for handicrafts or subsistence. The foregoing exceptions aside, Congress left native subsistence, handicraft, and non-wasteful taking exactly as it was prior to the Act, regulated by the State of Alaska. While native subsistence hunting evidently is preferred to other kinds of taking under the Act, I do not regard this preference to override the Act's policy of protecting marine mammals.

The record indicates that annual non-wasteful, subsistence, and handicraft taking of the subject species and population stocks by Alaskan natives is in the following amounts: Northern sea lion (0); harbor seal (500); larcha seal (2,800); ringed seal (4,500); ribbon seal (250); bearded seal (1,500); beluga whale, Cook Inlet stock (3); and, beluga whale, Bering/Chukchi Sea stock (150).

RETURN OF MANAGEMENT

At this time, I must defer the consistency determination allowed under Section 109(a)(2) of the Act and 50 CFR Part 216, Subpart H, and I do not adopt the ALJ's suggestion that Alaska's laws and regulations be approved. The laws and regulations appearing in the record are not current.

Alaska must effect appropriate changes to its laws and regulations before I can begin the process culminating in a determination of consistency and a return of management to the State. Therefore, the waiver and regulations approved today will not be effective immediately.

To facilitate this subsequent consistency determination, Alaska's laws and regulations must conform to the criteria and procedures set forth in 50 CFR 216.105 and related sections of 50 CFR Part 216, Subpart H. Also, with respect to the ALJ's recommended and required changes to Alaska's laws and regulations I have the following comments:

1. I take no position regarding the prohibition on the taking of polar bears in dens because polar bears are not under NOAA jurisdiction.

2. I take no position regarding the ALJ's recommendation that standards be set for, and preference be given to, subsistence takers. The record appears to indicate that legitimate subsistence needs are, and would be, preserved by the State.

3. I adopt the ALJ's recommendation that extreme caution and prudence, allowing margins of safety, are to be exercised by the State in calculating its harvest limits.

4. I adopt the ALJ's recommendation that regional or village quotas should be set.

5. I do not adopt the ALJ's recommendation that specimens from commercial harvests be taken. The State should determine whether such sampling is necessary to satisfy its research and other needs.

6. With modification, I adopt the ALJ's recommendation that the OSP standard should be clearly enunciated in the State's laws and regulations. The modification is that the State must recognize the definition of OSP for marine mammals I adopted above. OSP is the cornerstone of the Act and must be fully incorporated into the State's laws and regulations before I can make any determination of consistency.

7. I do not adopt the ALJ's recommendation that Alaska negotiate an enforcement arrangement with the Coast Guard. This appears to be an inappropriate topic for this decision. The State should ascertain whether an arrangement with the Coast Guard is necessary to augment its existing enforcement capability. NMFS already has an arrangement with the Coast Guard and will assist the State in this regard if Alaska determines that such assistance is necessary.

8. I do not adopt the ALJ's recommendation regarding a NMFS-FWS cooperative agreement because it is an inappropriate topic to be included in Alaska's laws and regulations. An agreement already exists on enforcement and NMFS will cooperate with FWS to insure proper marine mammal monitoring, review, and cooperative enforcement.

9. I take no position on the ALJ's recommendation to amend proposed 50 CFR 18.95(k) because it does not pertain to any species under NOAA jurisdiction.

10. I do not adopt the ALJ's recommendation regarding a "working partnership" between the State and native communities. I am satisfied that the State already has substantial contact with the native communities, has gone to considerable length to insure that it receives substantial input from these native communities on all relevant matters, and that the State intends to continue and improve this interaction.

11. The ALJ recommended that all changes in the State's laws, regulations, policies, and permits be published in the FEDERAL REGISTER to allow non-Alaskan participation. I adopt the ALJ's recommendation only with respect to proposed changes in Alaska's laws and regulations after management is returned to it. 50 CFR 216.103(f) already requires all changes to Alaska's laws and regulations (except emergency closing of seasons) to be approved by me only after public

notice and comment. I do not adopt the ALJ's recommendation that all policy changes and permit applications be treated similarly. Alaska's management policies will be subject to significant public comment when its laws and regulations are submitted to me for a consistency determination and whenever its laws and regulations are changed. Moreover, after a return of management, the State's annual reports, in which the management policies are reflected, will be subject to review by the public and the MMC. Therefore, additional FEDERAL REGISTER procedures are unnecessary. As to the State's permitting scheme, publishing each permit in the FEDERAL REGISTER will hamper Alaska's efforts to manage these species effectively. As noted later in this decision, I have retained numerous safeguards to apply in the event Alaska's laws, regulations, management, or permitting scheme in any way or at any time work to the disadvantage of any species or population stock.

12. With amplification, I adopt the ALJ's humaneness recommendation regarding the training of clubbers, backup staff, grouping of animals, and the use of stickers. First, I note that Alaska's 1978 game regulations (5 AAC 81.100) appear to prohibit clubbing altogether; hence, the specific recommendation insures that if Alaska laws and regulations are changed to permit any clubbing in the future, clubbing will be done in accordance with this recommendation.

Second, to insure that the laws and regulations submitted by Alaska for a consistency determination control all inhumane and wasteful taking and satisfy the Act's humaneness requirement, such laws and regulations shall require that taking be accomplished in a humane manner and that harassment be reduced to the maximum extent. The State cannot issue permits that allow harassment of marine mammals.

13. I do not adopt the ALJ's recommendation regarding the use of Federal ALJ's as hearing officers in State civil prosecutions after a return of management. The State should decide whether the use of U.S. ALJ's is necessary to augment its own judicial system.

14. With amplification I adopt the ALJ's finding that Alaska has a modern scientific resource management program. To satisfy the criteria in 50 CFR 216.105 and the reporting requirements in 50 CFR 216.106 and to establish the continuing research and analysis program envisioned by the Act and recommended by the ALJ, Alaska's revised laws and regulations and other management efforts must insure that the best available scientific evidence is collected regarding the

number of animals taken under the waiver regulations. Alaska must be able to ascertain when an annual taking limit is, or is likely to be, exceeded.

Also, in accordance with the recommendation of the Marine Mammal Commission, Alaska must convene a population study workshop to evaluate the current status of each species and population stock. The results of the workshop must be included in the first annual report submitted to NOAA, if and when management is returned to the State.

15. I take no position in the ALJ's recommendation regarding polar bear hunting by dogs. Polar bears are not under NOAA jurisdiction.

16. I do not adopt the ALJ's recommendation that the native guide and broker problem be resolved by changes to Alaska's laws and regulations at this time. The problem is an internal one that does not appear to relate to the possible consistency of State laws and regulations with the Act or with the propriety of returning management to the State. Alaska should determine for itself the best solution to the problem.

17. I do not adopt the ALJ's recommendation that regulations be considered that require Alaska to furnish data and other necessary information to the MMC. NMFS will have access to all data needed by the MMC and if NMFS does not have the information needed by the MMC, NMFS can make an appropriate request to the State. Given the numerous reporting requirements Alaska will have to satisfy after a return of management, I do not believe that it should be subjected to any further information gathering responsibility. Alaska will be reporting the needed information to NMFS, which has responsibility for monitoring the State's activities under the waiver, and NMFS in turn will be consulting with the MMC.

CHANGES TO PROPOSED REGULATIONS

50 CFR Part 216, Subpart I, has been revised to reflect the determinations and positions noted above. Proposed § 216.113(k) relating to tanneries has been deleted. The tannery registration requirement was proposed as a check on the number of animals taken under the waiver. However, I am not satisfied that the system is workable and the State has other means available to determine what animals have been taken under the waiver.

SAFEGUARDS

In accordance with my authority under section 101(a)(3)(A) to effect a waiver only to the extent I deem compatible with the Act, I have reserved authority to suspend or terminate takings or reimpose the waiver as war-

ranted. Under 50 CFR 216.113(e), I shall suspend or terminate takings at any time during the calendar year, by notice to the State and publication in the FEDERAL REGISTER, if the annual taking limits are exceeded (or are likely to be exceeded) based on best available information and if Alaska has not taken (or does not take) appropriate steps to remedy the situation. A suspension or termination does not reimpose the moratorium on the species or population stock in question. However, under 50 CFR 216.113(f), if at any time takings cause a species or population stock to diminish below OSP or if Alaska's management does not preserve the purposes and policies of the Act or maintain OSP and a healthy ecosystem, I shall reimpose the moratorium under section 101(a) by notice to the State and publication in the FEDERAL REGISTER.

Also, under section 101(a)(3)(B) and section 101(b) of the Act, I can terminate all taking (except for scientific research) of a subject species or population stock by designating it as depleted. For this purpose, "depleted" means any species or population stock that is below OSP or which otherwise satisfies the definition found in section 3(1) of the Act.

Finally, I have a continuing responsibility under section 109(a)(3) of the Act and 50 CFR Part 216, Subpart H, to monitor continuously the implementation and enforcement of previously approved State laws and regulations. If management is returned, Alaska is required to submit annual reports of its management efforts. These reports can be approved only after consultation with the Marine Mammal Commission and comment from the public. Approval depends on whether the State's laws, regulations, and management efforts comply with the requirements of the Act and 50 CFR Part 216, Subpart H.

Moreover, any modifications, amendments, deletions, or additions to previously approved State laws and regulations must be reviewed and approved in accordance with 50 CFR Part 216, Subpart H, before they can take effect.

SUBSEQUENT EVENTS

As noted above, my decision takes no position on the consistency or inconsistency of Alaska's laws and regulations. The laws and regulations in the record are not current. 50 CFR Part 216, Subpart H, explains how Alaska may obtain a review of proposed or existing laws and regulations for consistency. After a submittal, 50 CFR 216.106(f) requires my preliminary determination of consistency or inconsistency to be published in the FEDERAL REGISTER and I must take public comment into consideration before render-

ing a final determination. After approval of a State's laws and regulations, 50 CFR 216.104(e) requires any modifications, amendments, deletions, or additions to such laws and regulations (except emergency closing of seasons) to be reviewed and approved under 50 CFR 216.106 before they can take effect.

In the instant case, it is expected that the State of Alaska and NOAA will execute a management agreement that elaborates on the management effort Alaska will undertake if management is returned to it. The agreement will be submitted with Alaska's amended laws and regulations and will be open to public comment in accordance with the above noted procedures.

Dated: January 5, 1979.

RICHARD A. FRANK,
Administrator.

50 CFR Part 216 is hereby amended by adding a new Subpart I as follows

Subpart I—Waiver of The Moratorium on Taking of Marine Mammals

Sec.

- 216.110 Purpose of regulations.
- 216.111 Scope.
- 216.112 Definitions.
- 216.113 Taking of seals, sea lions and Beluga Whales (Alaska).

AUTHORITY: Secs. 103 and 109 of the Marine Mammal Protection Act of 1972, as amended, (16 U.S.C. 1373 and 1379).

Subpart I—Waiver of the Moratorium on Taking of Marine Mammals

§ 216.110 Purpose of regulations.

Pursuant to section 103 of the Act, the regulations contained in this subpart insure that the taking of each species or population stock of marine mammal for which the moratorium imposed by section 101 of the Act has been waived will not be to the disadvantage of any species or population stock.

§ 216.111 Scope.

(a) The provisions of this subpart apply with respect to each species or population stock only after (1) the Administrator has made a decision to effect a waiver and allow taking such species or population stocks pursuant to Section 101(a)(3)(A) of the Act; and (2) a State has adopted and submitted to the Administrator laws and regulations relating to the protection and taking of such species and population stocks and the Administrator has approved such State laws and regulations pursuant to Section 109(a)(2) of the Act and Subpart H of this part.

(b) The provisions of this subpart, unless specifically stated otherwise, apply to all taking of marine mammals by U.S. citizens and residents in Alaska and the waters off Alaska.

(c) The provisions of this subpart do not apply to nonlethal scientific research or public display, which shall be permitted in accordance with § 216.31, and incidental taking by foreign persons or foreign vessels, which shall be permitted in accordance with § 216.24.

§ 216.112 Definitions.

For purposes of this part:

(a) "Alaska" means all lands and waters within the seaward boundary of the State of Alaska;

(b) "Foreign person" means any person who is not a U.S. citizen or resident; "foreign vessel" means any vessel other than a vessel documented or certificated under U.S. laws.

(c) "Lethal scientific research" means scientific research in which the subject mammal is killed or seriously injured.

(d) "Pup" refers to a marine mammal which is born in the year in which it is taken in a commercial harvest.

(e) The term "Waters off Alaska" means waters outside Alaska and west of longitude 130° W., north of latitude 50° N., east of the U.S.-Russia Convention Line of 1867, and south of latitude 75° N.

§ 216.113 Taking of Seals, Sea Lions and Beluga Whales (Alaska).

(a) Pursuant to Section 101(a)(3)(A), 103 and 109 of the Act, and subject to the terms and conditions of this section, the moratorium and other requirements of section 101(a) of the Act are waived to allow the kinds of taking described in § 216.111(b) up to the following amounts on an annual, calendar year basis effective with the publication of the notice of approval of the laws and regulations of the State of Alaska pursuant to § 216.104(d).

Species	Annual taking limit on mortality and serious injury
Northern (Steller), Sea Lion (<i>Eumetopias jubatus</i>).....	* 6,648
Harbor Seal (<i>Phoca vitulina</i>).....	* 10,511
Largha Seal (<i>Phoca largha</i>).....	5,700
Ribbon Seal (<i>Histiophoca vasciata</i>).....	500
Ringed Seal (<i>Pusa hispida</i>).....	20,000
Pacific Bearded Seal (<i>Enignatha barbatus</i>).....	** 9,000
Beluga Whale (<i>Delphinapterus leucas</i>).....	10
Cook Inlet stock, Bering-Chukchi Sea stock.....	350

* Two (2) pups may be taken in lieu of one adult, but only in commercial harvests and in accordance with age restrictions established by the State of Alaska. In accordance with 50 CFR 216.112(d), the State can allow only animals born in the year in which they are taken to qualify as pups.

** To be measured by the landing and taking ashore of 3,000 animals.

(b) The State of Alaska must insure that for each species and population

stock, no more than the number of animals set forth in paragraph (a) of this section are taken annually.

(c) All takings of marine mammals allowed by § 216.111(b) and § 216.113(a) and all related activities shall be conducted in accordance with the applicable laws and regulations of the State of Alaska and the United States.

(d) The takings of marine mammals allowed by §§ 216.111(b) and 216.113(a) shall be duly licensed or otherwise authorized in writing as follows:

(1) *Alaska citizens and residents (including resident aliens)*. All subsistence, direct, incidental, and lethal scientific research taking in Alaska and the waters of Alaska shall be permitted in accordance with laws and regulations established by the State of Alaska;

(2) *Non-Alaskan-U.S. citizens, residents, and resident aliens*. (i) All direct and incidental taking, and lethal scientific research in Alaska shall be permitted in accordance with laws and regulations established by the State of Alaska; (ii) if such takings occur in the waters off Alaska, they shall be permitted in accordance with the laws and regulations of the U.S.

(3) With respect to all permit applications for taking in the waters off Alaska under paragraph (d)(2)(ii) of this section, the Assistant Administrator for Fisheries, NOAA, shall consult with appropriate officials of the State of Alaska prior to issuing any permits.

4. The State of Alaska shall consult with the Assistant Administrator for Fisheries, NOAA, prior to issuing any lethal scientific research permits under paragraphs (d)(1) and (d)(2) of this section.

(e) Whenever the taking of any species or population stock during any calendar year reaches, or is likely to reach 90 percent of the annual taking limit under paragraph (a) of this section, the Administrator shall be notified pursuant to § 216.107. After notification, the State of Alaska must take appropriate steps to insure that the annual waiver limit is not exceeded, including, if necessary, an immediate termination of any taking under its control. If the State of Alaska does not take such appropriate steps, the Administrator as he deems appropriate, by notice to the State of Alaska

and publication in the FEDERAL REGISTER, shall suspend and terminate any takings authorized by the State of Alaska for the calendar year in question.

(f) Whenever any species or population stock diminishes or is likely to diminish below its optimum sustainable population, or if the State of Alaska does not preserve the purposes and policies of the Act, or maintain optimum sustainable population and a healthy ecosystem, the Administrator shall by notice to the State of Alaska and publication in the FEDERAL REGISTER reimpose the moratorium on the taking of such affected species or population stock provided by section 101(a) of the Act.

(g) No marine mammal or product thereof taken under this section may be removed from Alaska or the waters off Alaska unless it is marked, tagged, or otherwise identified as required by State law or regulation and such mark, tag, or other identification remains on the part or product or container until the final stages of processing.

(h) For those persons or vessels subject to Alaskan jurisdiction, any violation of the laws and regulation of the State of Alaska applicable to the taking of marine mammals, committed in the waters off Alaska, shall be a violation of 50 CFR Part 216, Subpart I. For those persons or vessels not subject to the jurisdiction of the State, any violation of these regulations in Alaska and the waters off Alaska may be punished in accordance with the procedures and penalties of sections 105, 106, and 107 of the Act and the regulations in this part.

(i) In accordance with paragraph (d)(2)(ii) of this section, the Administrator, after consultation with the State of Alaska, may issue permits to non-Alaskan, U.S. citizens authorizing the taking of any marine mammal listed in this section in the waters off Alaska. Applications for permits shall include:

- (1) Name and address of applicant;
- (2) Month and year of taking;
- (3) Identity of the marine mammal and the quantity to be taken;
- (4) Proposed location of taking;
- (5) Method of taking;
- (6) Proposed disposition of parts and products and method of shipment;
- (7) The following certification:

I hereby certify that the foregoing information is complete, true and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining the benefits of a permit under the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407) and regulations promulgated thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001 or to penalties under the Marine Mammal Protection Act of 1972; and

(8) Signature of the applicant;

(j) Permits applied for under paragraph (i) of this section shall be terminated by reimposition of the moratorium or any closure of a season by the State of Alaska.

(k) Permits issued under paragraph (i) of this section shall contain such terms and conditions as the Administrator may deem appropriate to ensure that any taking and subsequent disposition shall be in accordance with the Act, with these regulations, and with the applicable provisions of Alaska's approved laws and regulations and shall include:

(1) The number of animals which are authorized to be taken;

(2) The location from which they may be taken;

(3) The method of taking;

(4) The period during which the permit is valid, which period shall be subject to reimposition of the moratorium, or any closure of a season by the State of Alaska;

(5) Any requirements for reports or rights of inspection with respect to any activities carried out pursuant to the permit;

(6) The conditions of sale or other disposition of any parts or products including any marking requirements; and

(7) A reasonable fee covering the cost of issuance of such permit, including an appropriate apportionment of overhead and administrative expenses of the Department of Commerce. In no event will the cost be less than the fee for the comparable non-resident license or permit issued by the State of Alaska.

(Secs. 103, 109, Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1373, 1379).)

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