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The proceedings involving walrus are particularly instructive regarding the deficiency of the process under which management can be returned to a state. In December 1975, approximately three years after the state's initial request, the return of management of walrus was conditionally approved by the Department of the Interior. After the state made some changes in its laws and regulations affecting the management of walrus, final approval was granted in April of 1976.

Public hearings, as required under the MMPA, were held in June, July, and October 1976, to discuss returning management of the other eight species to the state. In June 1977, the administrative law judge who conducted the hearings recommended to both secretaries that management be returned to the state. About one and one-half years after the administrative law judge recommended returning management to the state, the two secretaries, under certain conditions, agreed to return management of the other eight species to the state.

In returning walrus management to the State of Alaska, the Secretary stipulated that the State could also regulate the subsistence harvest of walrus by Alaskan natives. The Act, however, specifically provides that Alaskan natives may take marine mammals for subsistence and native handicrafts without regulation if the taking is not wasteful and if the species is not depleted. The native people of Togiak, Alaska, brought suit in Federal District Court claiming that the state must guarantee the continued right of natives to take marine mammals and arguing that the Federal Government could not transfer management under the Act without such assurances. The Court held for the people of Togiak, stating that the Act preempts any state regulation of the native take. Because Alaska's constitution prohibits any discrimination among its citizens, the state could not comply with the Court's decision that the natives be given a preferred status with respect to the taking of marine mammals. The state returned management of walrus to the Federal Government in July, 1979, and retracted its request to manage the other marine mammal species.

It must be noted that during the period between 1973 and 1976, when the State of Alaska was awaiting approval of its request to have management of the walrus returned, the Fish and Wildlife Service did little to manage the walrus because the Service expected the state would soon resume management. Therefore, for a period of about four years after the Act was passed there was neither Federal nor state management of walrus. After the state returned walrus management to the Secretary, there was no effective management of this species because of the inadequate Federal resources which are devoted to marine mammal management and because the Federal Government has no authority to regulate the take of non-depleted marine mammals by Alaskan natives. The result is that the current population of walrus, estimated at 250,000, is considered by many scientists to be larger than its habitat can effectively support. From an ecological viewpoint, it is both unhealthy and environmentally destabilizing to have a population at a level higher than the relevant habitat can sustain. The lengthy process entailed in the return of management provisions of the Act, here, in the case of the walrus, resulted in a situation in which the goals of the Marine Mammal Protection Act—the maintenance of healthy populations of marine mammals—could not be met.

The conclusions reached by a recent General Accounting Office study of the Act clearly illustrate the extent of the problem. This study stated that:

For the most part, marine mammal interest groups believe that the walrus management problems stem from the large walrus population which is having an adverse impact on the carrying capacity of the marine ecosystem . . . In January, 1973 the state of Alaska, desiring to continue its management of marine mammals, requested, under the provisions of MMPA, that a waiver of the moratorium on the taking of nine marine mammals (including the walrus) be granted and management be returned to it. Reaching a decision on this request has been a slow process and the end result is that some eight years after the state's request many of the problems and issues . . . remain unresolved. Admittedly, the waiver process is burdensome and, in the case of Alaska's request, was not made any easier with split Federal agency jurisdiction requiring review and formal hearings by two separate agencies . . . Because the Fish and Wildlife Service did little to manage the walrus while the state's request was pending (the Service assumed that the state would soon be granted management control), the walrus was not managed or controlled by either a Federal or state agency. The Federal agencies need to act faster on states' requests for a waiver on the taking of marine mammals and return of management.

The Committee concurs with the GAO conclusion and finds that one of the major reasons for the failure of Federal agencies to expedite action on state requests for return of management and waiver of the moratorium is the cumbersome procedures mandated under the Marine Mammal Protection Act which require extensive formal hearings. To remedy this problem and to ensure that effective conservation of management programs for marine mammals are implemented, H.R. 4084 establishes a simplified procedure under which a state could resume management of marine mammal species.

The Committee also received testimony that, despite the dramatic decline in the number of porpoises incidentally taken in tuna fishing operations, the administration of the provisions of the Act relating to incidental take have been characterized by excessive litigation. The tuna industry is operating in fear of being shut down by law suits, a fear which hampers investment in America's distant-water tuna fleet.

This fear is generated by those provisions of the Act which establish as the immediate goal of the Act that the incidental kill or serious injury of marine mammals pursuant to commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. It is the tuna industry's contention that so long as the industry is using the best economically and technologically feasible equipment and methods to reduce incidental porpoise mortality, the fleet can do no more. It has been argued by others, however, that zero mortality means precisely what it says and that the industry should be taking virtually no porpoises. The threat of litigation in this regard is of constant and continuing concern to the U.S. distant-

water tuna fleet. The tuna industry, which contributes approximately \$1.2 billion annually to the gross national product, would be faced with severe economic consequences if a court interpreted the zero mortality goal in the strictest sense and failed to take into account the economic and technological practicability of achieving that goal.

Besides the aforementioned problems relating to the incidental take of porpoises in tuna fishing operations and the return of management to the states, the bill addresses several other major problems associated with the Act.

First, the Departments of Commerce and the Interior, the tuna industry, and the states raised questions concerning the definitions of "optimum sustainable population" (OSP), "optimum carrying capacity" (OCC), and "depleted". Under the Act, a species is said to be "depleted" if it has declined to a significant degree over a number of years, is likely to become endangered, or is below the OCC of its environment. "OCC" means the ability of the habitat to support a species at its "OSP". However, OSP is defined as the level where the stock is reproducing at a maximum rate, based on the OCC for the species. The definitions are circular. Further, translating OCC and OSP into numbers requires estimates of population levels prior to commercial exploitation. Such calculations have demanded complex scientific analysis, postulating entirely unknown balances within a former marine ecosystem. It was alleged that these definitions are unworkable and must be replaced by more traditional management concepts and H.R. 4084 clarifies these definitions.

It was also brought to the Committee's attention that non-tuna commercial fishing operations and other activities which occur in areas occupied by marine mammals result in the take of some of these animals incidentally, although at a rate far below the level of tuna-porpoise mortalities. However, the same lengthy regulations requiring OSP determinations and permits which are applicable to the tuna industry also apply to activities involving small numbers of incidental takes. Only a fraction of non-tuna fishermen apply for a permit because of the cumbersome procedures required under the Act. The result has been a loss of data because most of these incidental takes go unreported. This symptom of "over management" has suggested the need for a two-tiered management scheme, distinguishing significant from insignificant takes, which is contained in H.R. 4084.

In addition to these major concerns, a number of more narrow, but equally important, issues were raised. For example, with regard to the take of marine mammals by Alaskan natives under the provisions of section 101(b) of the Act, it is questionable whether the Federal agencies have the authority to monitor the harvest in order to provide the critical data needed in any management program. The increasing extent of the native harvest necessitates that adequate information on the nature of this harvest be available in order to monitor the impact of the harvest on marine mammal species. In the case of the walrus harvest, for example, all legal hunting is done by the natives. Any non-native harvest is illegal under the MMPA. Since the Act was passed in 1972 the number of walrus that the natives kill has increased significantly. From 1959 to 1971, an average of about 3,300 was taken each year. The current number is estimated at 10,000 a year. The

General Accounting Office, in its recent report on the Act, notes that a monitoring program would provide essential management data on the status and condition of the walrus population. Unfortunately, as noted above, it is less than clear under the existing Act whether the appropriate Federal agencies have the authority to monitor the nature and extent of the native take of marine mammals. In addition, it is feared that the prohibition section contains a loophole that will allow for the commercialization of marine mammal products by natives, which goes far beyond the obvious intent of the Act.

Another relatively narrow issue was raised by Federal officials who expressed concern because persons who unintentionally violate the import provisions of the Act are often required to go through civil penalty proceedings, when simply abandoning the item at the port of entry would provide a sufficient deterrent.

Finally, members of the scientific community requested broader authority to deal with stranded animals. All of these issues are addressed in the legislation.

H.R. 4084, as reported by the Committee, has the endorsement of the major industries affected by the Act and of the major environmental organizations concerned with the Act. The bill maintains the noble purpose of the Act to preserve strong, healthy populations of all marine mammals. At the same time it encourages greater state participation in marine mammal management and reduces the regulatory burden on those activities which have a minimal impact on marine mammals.

#### SECTION-BY-SECTION ANALYSIS

There follows a section-by-section analysis of H.R. 4084 accompanied, where appropriate, by additional discussion.

##### SECTION 1

Section 1 of H.R. 4084 amends Section 3 of the Act by deleting the definition of "optimum carrying capacity", amending the definition of "depleted", and making the conforming amendments required by these changes.

In deleting the term optimum carrying capacity, it is not the Committee's intent to substantively change the Act or to alter the meaning of, or methods by which, optimum sustainable population is calculated. Since the passage of the Act in 1972, there have been a number of workshops and conferences which have addressed scientific issues arising under the Act. At all of these meetings, scientists have treated the definition of optimum carrying capacity as interchangeable with the definition of optimum sustainable population. In fact, neither the regulations of the Fish and Wildlife Service nor those of the National Marine Fisheries Service define the term optimum carrying capacity. Further, in the first decision of the Administrator of the National Oceanic and Atmospheric Administration regarding the taking of marine mammals incidental to commercial fishing operations, the Administrator stated that:

Optimum carrying capacity is a characteristic of the habitat. This term, however, is defined in the Act as the 'ability of

a given habitat to support the optimum sustainable population of a species or population stock in a healthy state without diminishing the ability of the habitat to continue that function.' Optimum sustainable population is defined in terms of the number of animals that may exist in a particular habitat. Therefore, I have concluded as a matter of law that a species or stock is below the habitat's optimum carrying capacity when the number of individuals is below the optimum sustainable population, and consequently is depleted.

The effect of the Administrator's decision, which has been followed by both agencies since 1977, is to make the term optimum carrying capacity essentially identical to the term optimum sustainable population.

Given this history, the Committee believed that the term optimum carrying capacity was unnecessary to the operation of the Act and could be deleted.

The definition of the terms "depleted" or "depletion" is amended to mean any case in which:

(1) The Secretary, or a State to which management authority is transferred under section 109, determines that a species is below its optimum sustainable population; or

(2) A species is listed as endangered or threatened pursuant to the Endangered Species Act of 1973.

The current definition of these terms is unclear in both language and purpose. The Committee believed that the adoption of a single management standard—the maintenance of species at their optimum sustainable population—was consistent with the Act and would reduce confusion. The Committee also recognized that species that are listed under the Endangered Species Act are, a fortiori, not at their optimum sustainable population and, therefore, should be considered depleted.

In drafting H.R. 4084, and the amendments thereto, the Committee gave serious consideration to amending the existing definition of optimum sustainable population. After carefully reviewing various alternative definitions proposed by the concerned parties, the Committee decided not to amend the definition. In reaching this decision, the Committee reviewed the current regulatory definition of optimum sustainable population contained in 50 CFR 216.3 and determined that, given the present state of scientific knowledge, this definition accurately reflects the meaning of the term optimum sustainable population and the intent of the Congress in passing the original Act. The Committee recognizes, however, that new scientific knowledge may result in changes to the existing regulatory definition.

Under the existing regulations, optimum sustainable population is any population level within a range of population levels. The upper bound of the range is the largest average supportable level within the ecosystem (carrying capacity). The lower bound of the range is the population level for a given species or stock that results in maximum net productivity.

## SECTION 2

Section 101(a)(2) of the Act states that it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. Section 2 of H.R. 4084 amends section 101(a)(2) of the Act to provide that this goal is satisfied in the case of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.

In adopting this language, the Committee carefully considered the matter of the incidental taking of marine mammals in the course of commercial fishing operations and determined that the amendment to section 101(a)(2) is an appropriate clarification of the Act. In making this determination, the Committee restates its original view that it is not the intention of the Committee to shut down, or to significantly curtail, the activity of the tuna fleet so long as the Secretary is satisfied that tuna fishermen are using the best economically and technologically practicable marine mammal safety techniques. Although the amendment to section 101(a)(2) retains the Act's goal of reducing the incidental taking of marine mammals to insignificant levels approaching a zero mortality and serious injury rate, the Committee believes a clarification is appropriate in light of the lengthy history of the regulation of incidental taking in the purse seine yellowfin tuna fishery and the substantial progress that has been made in developing new techniques and equipment for avoiding the incidental kill and serious injury of marine mammals. The Committee does not, however, intend that this amendment shall affect any authority the Secretary may have to promulgate regulations governing the incidental taking of marine mammals, including regulations prescribing annual quotas, which are found necessary to fulfill the obligations placed on the Secretary by the Act.

While recognizing the substantial progress that has been made in developing improved marine mammal safety techniques and equipment, the Committee is cognizant of the need to ensure that the best marine mammal safety techniques and equipment are used in the future. With this in mind, the Committee intends that its amendment be understood to require the use of new and improved marine mammal safety techniques and equipment once they have been developed, tested in the yellowfin tuna fishery, and determined, by the Secretary, to be economically and technologically practicable. The amendment to section 110, described below, will facilitate such development.

In considering this issue, the Committee declined to modify or elaborate upon the Act's goal with respect to other fisheries which incidentally take marine mammals. This does not mean that similar action could not be taken in the future when further data is available. The contrast between the substantial progress made by the tuna fleet in developing new techniques and equipment for reducing marine mam-

mal mortality and the failure of the foreign high seas salmon gillnet fishery, for example, to develop new techniques and equipment for reducing incidental mortality justifies limiting the amendment to the yellowfin tuna fishery. The existing goal in the Act can properly be used to stimulate new technology for reducing the incidental taking of marine mammals.

The language contained in the amendment to section 101(a)(2) regarding the rights of the Secretary of the Treasury to ban the importation of fish or fish products under certain circumstances merely incorporates the presently existing language in the Act. The Committee is aware that the United States presently requires those countries desirous of importing tuna products to comply with a specified certification program. It is the intent of the Committee that this certification program be continued.

Section 2 further amends section 101(a) of the Act by adding new paragraphs (4) and (5). New section 101(a)(4) provides that during any five-year period the Secretary shall allow the incidental, but not the intentional, taking by United States commercial fishermen of small numbers of marine mammals. Before allowing such a take, the Secretary, after notice and opportunity for public comment, must find that the total of such taking will have a negligible impact on the species and must provide guidelines pertaining to the establishment of a cooperative system among the fishermen involved for monitoring the take. A finding of negligible impact cannot be made if the species is depleted. The Secretary is directed to withdraw or suspend the permission to take marine mammals under this provision if he finds, after notice and opportunity for public comment, that the taking is having more than a negligible impact on the species or that the purposes, policies and goals of the Act would be better served by applying the permit procedures otherwise provided for under the Act. Commercial fishermen authorized to take marine mammals pursuant to this new provision would not be required to seek permits pursuant to section 103 in accordance with regulations promulgated under section 103 of the Act.

New section 101(a)(5) provides that the Secretary shall allow, upon request by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, the incidental, but not the intentional, taking of small numbers of marine mammals. This permission may be granted for periods of 5 years or less. Such taking may be allowed only if the species involved is not depleted and if the Secretary, after notice and opportunity for public comment, (1) finds that the total of such taking will have a negligible impact on the species and its habitat, and on the availability of the species for subsistence uses, (2) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance, and (3) prescribes regulations pertaining to the monitoring and reporting of such taking. The Secretary is directed to withdraw or suspend the permission to take marine mammals under this provision if he finds, after notice and opportunity for public comment, that (1) the regu-

lations regarding methods of taking, monitoring, or reporting are not being substantially complied with, or (2) the taking is having, or may have, more than a negligible impact on the species. Permission to take under this provision may be suspended without notice or public comment if the Secretary determines that an emergency exists which poses a significant risk to the species concerned.

Sections 103 and 104 of the Act do not apply to the taking of marine mammals occurring under the authority of section 101(a)(5).

Both sections 101(a)(4) and (5) authorize the incidental, but not the intentional, taking of small numbers of marine mammals. The phrase "incidental, but not intentional" is intended to mean accidental taking. The words "not intentional" should not be read to mean that persons who know there is some possibility of taking marine mammals incidental to commercial fishing operations or other specified activities are precluded from proceeding under the authority of section 101(a)(4) or (5).

The taking authorized under these new provisions is the taking of small numbers of marine mammals. The Committee recognizes the imprecision of the term "small numbers", but was unable to offer a more precise formulation because the concept is not capable of being expressed in absolute numerical limits. The Committee intends that these provisions be available for persons whose taking of marine mammals is infrequent, unavoidable, or accidental.

It should also be noted that these new provisions of the Act provide an additional and separate safeguard in that the Secretary must determine that the incidental takings of small numbers of marine mammals have a "negligible" impact upon the species from which such takings occur. This additional test is meant to serve as a separate standard restricting the authority of the Secretary. The term "negligible" is intended to mean an impact which is able to be disregarded. In this regard, the Committee notes that Webster's Dictionary defines the term "negligible" to mean "so small or unimportant or of so little consequence as to warrant little or no attention." Unless a particular activity takes only small numbers of marine mammals, and that taking has a negligible impact on the species, the new provisions of sections 101(a)(4) and (5) are not applicable to that activity.

It is the intention of the Committee that both the specified activity and the specified region referred to in section 101(a)(5) be narrowly identified so that the anticipated effects will be substantially similar. Thus, for example, it would not be appropriate for the Secretary to specify an activity as broad and diverse as outer continental shelf oil and gas development. Rather, the particular elements of that activity should be separately specified as, for example, seismic exploration or core drilling. Similarly, the specified geographical region should not be larger than is necessary to accomplish the specified activity, and should be drawn in such a way that the effects on marine mammals in the region are substantially the same. Thus, for example, it would be inappropriate to identify the entire Pacific coast of the North American Continent as a specified geographical region, but it may be appropriate to identify particular segments of that coast having similar characteristics, both biological and otherwise, as specified geographical regions.

Further, the Committee expects that persons operating under the authority of section 101(a)(5) shall engage in appropriate research designed to reduce the incidental taking of marine mammals pursuant to the specified activity concerned.

Sections 101(a)(4) and (5) each provide a mechanism for the Secretary to withdraw or suspend the permission to take marine mammals granted under these provisions. Because such permission can be granted for five-year periods, it is not the Committee's intent that the Secretary must wait until the expiration of that period before determining whether to withdraw or suspend this permission to take. However, assuming the absence of more than a negligible impact, the Secretary must allow a sufficient time for the voluntary reporting system provided for in section 101(a)(4) to be established and put to use. The Committee notes with respect to commercial fishermen operating under section 101(a)(4) that the establishment of a voluntary reporting system is in response to the failure of the current Act to provide adequate data regarding the incidental taking of marine mammals which occurs in non-tuna commercial fishing operations. If this voluntary system fails to produce such data after a reasonable period of time, the Committee intends to fashion a more appropriate response which will reflect the experience that such a voluntary system cannot work.

In the case of a specified activity occurring under section 101(a)(5), there may be more than one person participating in that specified activity. The fact that one person of the class is not in compliance with the regulations issued pursuant to the section is not a sufficient basis for withdrawing or suspending permission for all persons to continue to operate under this section. There must be substantial compliance by either a person or by the class as a whole, in order for that person or for the entire class, respectively, to proceed under the authority of section 101(a)(5).

Section 2 further amends section 101 by amending section 101(b) to clarify that the Native exemption established by section 101(b) does not apply to Indians, Aleuts or Eskimos who reside temporarily or permanently in states other than Alaska. It was not intended that section 101(b) be applicable to Natives in other states who might take marine mammals for subsistence purposes.

Section 2 further amends section 101(b) by providing that section 101(b) shall govern the taking of marine mammals by Alaskan Natives for subsistence uses except as provided in section 109. The purpose of this language is to explicitly overrule the decision of the United States District Court in *People of Toqiak v. United States*, 479 F. Supp. 423 (DC 1979), which determined that section 101(b) exempted Alaskan Natives from all state regulation. It is the Committee's intent to make it clear that Alaskan Natives are subject to state regulation pursuant to the provisions of section 109.

#### SECTION 3

Section 102 of the Act specifies the activities which are prohibited under the Act. Section 102(a) makes clear that these prohibitions apply except to the extent that they are permitted under other sections of the Act. Section 3(a)(1) of H.R. 4084 amends section 102(a) to in-

clude actions authorized under section 109 in the list of activities exempted from the coverage of section 102.

Section 3(a)(1) further amends section 102(a) by making it illegal for any person to possess a marine mammal, or any product from that mammal, and for any person to transport, purchase, sell, or offer to purchase or sell any marine mammal or marine mammal product. Section 102 as currently written makes the possession, transport, or sale, etc. of a marine mammal or its parts and products illegal only if the marine mammal was taken illegally. This has presented enforcement difficulties in the context of the taking for subsistence purposes where the taking itself is legal while the subsequent use of the marine mammal is in violation of the Act. H.R. 4084 makes it clear that the Secretary need not prove that the taking was illegal in order to proceed against individuals who are otherwise in violation of the Act. The Committee does not view this language as a new provision but rather as a clarification of what Congress always intended. In particular, the Committee reaffirms the fact that the disposition of the Native harvest is specifically provided for in section 101(b) and any other use is illegal, regardless of the circumstances under which the animal was taken. This provision is not intended to effect the transportation of legally taken marine mammals from the high seas into the territorial sea.

The Committee takes note that both the Fish and Wildlife Service and the National Marine Fisheries Service, in their regulations implementing the Marine Mammal Protection Act, have included the collection of dead animals or their parts as a form of taking. In this regard, the definition of marine mammals includes the parts of marine mammals because the protection of these animals necessarily requires the control of commerce in the valuable products derived from them. The Committee, therefore, agrees that including the collection of dead animals or their parts in the definition of take is proper because it would be impossible under any circumstances to distinguish between parts derived from animals which have been killed and those which died from natural causes.

Section 105(a) of the Act provides that any person who violates the Act may be assessed a civil penalty, except that no such penalty may be assessed unless the person is given notice, and an opportunity for a hearing, with respect to the violation. Any person who purchases a marine mammal product while overseas and who brings that product into the United States without a permit is in violation of the Act. It is not appropriate to subject individuals who unknowingly violate the Act by entering the United States with marine mammal products to a formal and lengthy notice of violation procedure. Therefore, section 3(b) of H.R. 4084 amends section 105(a) of the Act to authorize the Secretary, in lieu of instituting a formal notice of violation proceeding, to allow an individual to abandon the item at the port of entry if the importation was made for that individual's personal or family use and was not an importation for others or for sale or commercial use. This provision is intended to clarify that the Secretary has the authority to allow individuals to voluntarily abandon seized items at the port of entry without the necessity of further administrative proceedings. It is not intended to limit in any way the enforcement authority of the Secretary under this or any other Federal law.

## SECTION 4

Section 4 makes several amendments to section 109 of the Act. Subsection (a) amends section 109(a) to provide that no state may enforce, or attempt to enforce, any law or regulation relating to the taking of any marine mammal except as provided under section 109.

Subsection (a) also amends section 109(b) to provide that the Secretary shall transfer management authority for any species of marine mammal to a state if the Secretary finds, after notice and opportunity for public comment, that the state has developed and will implement a program for the conservation and management of the species that:

(a) Is consistent with the purposes, policies, and goals of the Act and with international treaty obligations,

(b) Requires that all taking of the species be humane,

(c) Does not permit the taking of the species unless—

(1) The state has determined, under a process consistent with the standards set forth in section 109(c), that the species is at its optimum sustainable population and has specified the maximum number of animals that may be taken without reducing the species below its optimum sustainable population; and

(2) The determinations required in (1) above are final and implemented under state law and, if appropriate, a cooperative allocation agreement provided for in section 109(d) has been implemented;

(d) Does not permit the taking of a number of animals that exceeds the maximum number determined pursuant to (c) above and, in the case of subsistence uses, does not permit the taking of a number of animals that would be inconsistent with maintaining the species at its optimum sustainable population;

(e) Does not permit the taking of the species for scientific research and public display purposes, except for taking by, or for, the state;

(f) Provides procedures for acquiring and evaluating data relating to the optimum sustainable population of the species and to the maximum take which could be allowed and, if required, for amending those determinations;

(g) Provides procedures for the resolution of any differences between the state and the Secretary that may arise during the development of a cooperative allocation agreement under section 109(d); and

(h) Provides for the submission of an annual report to the Secretary regarding the administration of the program.

Section 109(h) sets forth the program requirements a state must comply with before management authority is returned. It is the Committee's intent that the state have the burden of persuasion when the Secretary reviews the state program to determine if it is consistent with the requirements of section 109(b). In this regard, the Committee expects that the state program will be presented in a clear and coherent manner. Simply submitting a copy of the relevant state laws and regulations to the Secretary may not be sufficient to permit the Secretary to evaluate the state program.

Section 109(b), as amended, authorizes the taking of marine mammals for subsistence uses provided that the taking is not inconsistent with the maintenance of the species at its optimum sustainable population. The purpose of this language is to permit the taking of marine mammals for subsistence uses even when the population is below its optimum sustainable population. The Committee recognizes the particular dependence of local rural residents in Alaska on marine mammals and does not wish to preclude the taking of marine mammals when a species is below its optimum sustainable population, provided that the level of taking will permit the species to increase toward its optimum sustainable population. A level of take which will not permit the species to increase toward its optimum sustainable population shall not be allowed. The Committee wishes to stress that the decline of a species to a level under its optimum sustainable population should be a rare occasion. The State, under the provisions of section 109(f), should begin to restrict non-subsistence and even nonessential subsistence uses before a species becomes depleted.

Section 109(b), as amended, also makes it clear that a state may not permit the taking of marine mammals for scientific research and public display purposes unless such taking is done by, or for, the state. Management of this take is retained at the Federal level except that, pursuant to section 109(b)(3)(B)(ii), the Secretary may not permit the removal of live animals from a state to which management authority has been returned if that state disapproves the taking as inconsistent with its program. The state consistency determination must be made within 30 days of the date the permit is issued. The Committee expects that a state will be kept fully informed regarding permit applications and that the state will make its consistency finding, to the maximum extent practicable, prior to the permit being issued. To facilitate this objective the Secretary should make copies of permit applications available to the state as soon as they are received by the Secretary. Where this is not possible, the state should make its consistency finding promptly after the permit is issued. The Committee also expects the state to provide a mechanism whereby permittees can request the state to reconsider a finding that the permittee believes to be in error. The Committee notes that the state's review and approval authority only applies to permits approved after management authority is returned to the state. Permits approved prior to that time are not subject to state review even if the taking occurs after management authority is returned. Finally, the Committee wishes to make it clear that once state approval is given, it is valid for the duration of the permit.

The Committee wishes to emphasize that section 109(b)(2), as amended, specifically provides that until the state determination of a species' optimum sustainable population and the maximum allowable take is final and implemented, the state program shall not apply with respect to the taking of that species and the Secretary shall continue to regulate all taking consistent with the Act.

However, pursuant to section 109(b)(3), after these determinations are final and implemented under state law and after a cooperative allocation agreement, if required, is implemented, the state's optimum sustainable population and maximum take determinations shall be

treated, for purposes of applying this title beyond the territory of the state, as a section 102 Federal waiver of the moratorium on taking within the Fishery Conservation Zone. Where management authority has been returned to the state and where the required determinations and agreements have been made, the state will have exclusive authority to manage marine mammals within the state, including its territorial waters, except for scientific and public display takings described above. Section 109(b)(3)(B) is intended to make this explicit.

Section 4(a) further amends section 109 by adding a new subsection (c). New subsection (c) sets forth the process a state must complete before any determination of the optimum sustainable population and the maximum allowable take for a marine mammal species is final under section 109(b). The process required must comply with the following standards:

(1) The state must make an initial determination of whether the species is at its optimum sustainable population and the maximum take which will be consistent with maintaining the species at its optimum sustainable population. In making these determinations the state must make available, under reasonable circumstances, the documentation supporting the determinations. This requirement is satisfied only if the public has reasonable access to the documentation. A state is neither required to duplicate, at its own expense, this documentation nor provide it to any member of the public who requests it. However, access to the documentation should be readily available, and if any interested party requests copies and agrees to pay the costs of duplication, the state should provide actual copies of the documents. If a request for a hearing regarding the initial determinations is not made, those determinations shall be treated as final. The Committee expects that the State will establish a reasonable time period, such as 30 days, in which a request for a hearing can be made.

(2) The state shall provide an opportunity, at the request of any interested party, for a hearing with respect to the initial determinations. At any such hearing, interested parties may present evidence regarding the determinations and may cross-examine persons presenting evidence. Prior to the hearing, the state must give public notice of the hearing and make available and distribute upon request a list of witnesses for the state and a general description of the documentation and other evidence that will be relied upon by such witnesses. It is essential that the state, prior to the hearing, make available and distribute these lists and descriptions, for without such advance notice, the right of cross-examination is significantly diluted. Persons serving notice that they wish to cross-examine witnesses at the hearing must be given sufficient time to familiarize themselves with the evidence which the state will present and to prepare appropriate questions. The fact that section 109(c)(2) states that interested parties may present oral evidence and cross-examine at the hearing does not mean that only those persons presenting evidence are entitled to cross-examine. There is not a condition precedent to the right of cross-examination except that the state may require persons desiring to exercise that right to notify the state of their intent. Finally, the Committee

notes that the state may not call witnesses and present documentation at the hearing unless the advance notice requirements are met.

(3) If a hearing is requested on the initial determinations, the state must make its final determinations solely on the basis of the record developed at the hearing. The word "solely" is intended to mean exclusively. A state may not rely on evidence, oral or written, which is not presented at the hearing. All written documentation, therefore, must be entered into the record by a person able, by virtue of training and experience, to respond fully to cross-examination regarding the facts and conclusions contained in the written material.

(4) Opportunity for judicial review of the state's final decision must be available under state law. However, the Secretary may not initiate judicial review of any such decisions.

Once the state program has been approved and the section 109(c) process completed, the Secretary retains no residual authority to waive the moratorium and permit takings within state boundaries in addition to those which may be allowed by the state. With respect to the section 109(c) process, it is not the Committee's intent that the state be required to comply with that process on an annual basis. It may be that the management of the species will require annual determinations of optimum sustainable populations and maximum permissible take. However, this may not necessarily be the case, even though state regulations setting different levels of take within the maximum number allowed and state regulations establishing seasons, areas, manner, etc. of take may change from year to year. Finally, the Committee wishes to make it clear that the procedure required under section 109(c) is applicable only to the determination of the optimum sustainable population of a species and the maximum take of that species which may be allowed in order to maintain the optimum sustainable population. The section 109(c) process is not applicable to other decisions made by the state respecting marine mammals. For example, a state's decision regarding the seasons, areas, manner of take, etc. is not subject to the section 109(c) process.

Section 109(d)(1), as amended by section 4(a) of H.R. 4084, establishes a procedure for integrating Federal management of marine mammal species in the Fishery Conservation Zone with state management of such species in the territorial sea once management authority has been returned to the state. Section 109(b)(3) states that if the range of a species with respect to which an optimum sustainable population determination is made under section 109(b)(1)(C) extends beyond the territorial waters of the state, then the state's optimum sustainable population and maximum allowable take determination shall be treated within the Fishery Conservation Zone as a Secretarial determination made in accordance with section 103 and as an applicable waiver of the moratorium under section 101(a). Section 109(b)(3) further provides that in this situation, no taking of a marine mammal may be allowed until a cooperative allocation agreement is entered into between the state and the Secretary. The purpose of the agreement is to establish how many of the allowable number of marine mammals which the state determines can be taken will be taken in the Fishery Conservation Zone and how many will be

taken in lands and waters under state jurisdiction. The cooperative allocation agreement may cover two, and only two, types of taking: (1) subsistence uses, and (2) takings provided for under section 101(a) which occur within the Fishery Conservation Zone. Taking within the territorial sea or on land within the state is solely within the discretion of the state after the two priorities established in the cooperative allocation agreement are satisfied.

The Committee notes that one purpose of the cooperative allocation agreement and the dispute resolution mechanism provided for in section 109(b)(1)(G) is to ensure that the state does not assert the need for a number of mammals for subsistence uses which is not supported by historical experience or fact and which will preclude the occurrence within the Fishery Conservation Zone of commercial fishing and other specified activities involving the incidental taking of marine mammals. A second purpose is to ensure that the Secretary does not make unjustifiable claims regarding the number of marine mammals necessary for the Secretary to carry out his responsibilities pursuant to section 101(a). It is not intended that the cooperative allocation agreement be a vehicle by which the Secretary can assert that the state has provided inadequate numbers of marine mammals for subsistence uses. That issue is to be resolved by the state and subsistence users pursuant to the state's subsistence laws and regulations.

Finally, it should be noted that the taking which is the subject of the cooperative allocation agreement is taking which results in the killing or serious injury of marine mammals. It is not necessary that the cooperative allocation agreement address other forms of taking within the meaning of that term.

Section 109(d)(2) provides that if a state agency requests the Secretary to regulate the taking of a species subject to a cooperative allocation agreement within the Fishery Conservation Zone for subsistence uses or for hunting in a manner consistent with state regulations, the Secretary shall adopt and enforce such of the state's regulations as the Secretary considers to be consistent with his administration of section 101(a). This section is intended to provide a mechanism for the Federal adoption of state regulations in areas beyond state territorial waters and is included in the language of H.R. 4084 in light of possible questions regarding the extra-territorial application of state law. However, the Secretary shall adopt the state regulations only to the extent that they are consistent with the Secretary's responsibilities under section 101(a). For example, it is expected that State regulations relating to the caliber of a rifle which may be used to take a marine mammal would not affect the Secretary's responsibilities under section 101(a). On the other hand, a state regulation restricting the area or season for taking marine mammals could, if applied in the Fishery Conservation Zone, seriously impact the ability of the Secretary to permit commercial fishermen and other parties to take marine mammals within that zone. Such regulations would have to be carefully evaluated to determine if they should be adopted. Any regulation issued by the Secretary pursuant to this section shall be done under 5 U.S.C. 553 and any such regulations need not comply with the Regulatory Flexibility Act, the Paperwork Reduction Act, Executive Order No. 12291, and the thirty-day notice requirement of 5 U.S.C. 553(d).

Section 109(e) establishes a procedure under which the Secretary can revoke any management authority returned to a state under section 109(b). The Secretary is directed to revoke any such authority if he finds that the state program for the conservation and management of a species is not being implemented, or is being implemented in a manner inconsistent with the provisions of section 109 or the provisions of the program. The Secretary may not revoke any management transfer unless he first provides a written notice of his intent to revoke together with a statement indicating his reasons therefor and unless, during the ninety-day period following that notice of intent, the Secretary provides opportunity for consultation with the state and the state does not implement the necessary remedial measures. When a revocation by the Secretary becomes final, or if a state voluntarily returns management authority, the Secretary shall regulate the taking of a species within the state in accordance with this Act and, in the case of Alaskan Natives, pursuant to sections 101(b) and 109(i). In such a situation, the Federal moratorium as described in section 101(a) shall become effective until waived.

One of the bases for the Secretary to revoke state management authority is the failure of the state to comply with that part of its program requiring that the state have a procedure for evaluating new data and evidence relating to the optimum sustainable population of the species and the maximum take that would maintain the species at that level and, if required on the basis of that evaluation, for amending these determinations. A state may not be found in compliance with its program if it simply has procedures for acquiring data and evaluating that data. The state has an affirmative burden to alter its determinations pursuant to the process described in section 109(e) if the new data and other evidence indicates a need to do so. Failure to do so constitutes a basis for revocation of management authority by the Secretary.

The Committee carefully considered the question of whether it was necessary to include in the bill a provision expressly authorizing judicial review of action by the Secretary under section 109(b) approving or disapproving a proposed state management program or revoking or refusing to revoke such approval pursuant to section 109(e). The Committee concluded that it was unnecessary to do so, although the Committee does not intend to preclude judicial review at the request of interested parties. If the Secretary's action or inaction is unlawful under the applicable standards of review prescribed by the Administrative Procedures Act, then the affected state or other interested party will be able to seek appropriate relief. Jurisdiction and venue over any such action would be governed by statutes of general applicability codified in Title 28 of the United States Code.

Section 4(a) further amends section 109 by adding a new subsection (f) which provides that the Secretary may not transfer management authority to the state of Alaska for any species of marine mammal unless the state has adopted and will implement a statute and regulations that ensure the taking of such species for subsistence uses is accomplished in a non-wasteful manner, will be the priority consumptive use of the species, and if subsistence taking must be restricted, that such restriction will be based on: (1) the customary and direct

dependence upon the species as the mainstay of livelihood, (2) local residency, and (3) the availability of alternative resource. In addition, the Secretary must find that the state has adopted a statute or regulation requiring that any consumptive use of marine mammal species, other than for subsistence uses, will be authorized only if the appropriate state agency first makes findings based on an administrative record (which need not be the type of proceeding carried out before an administrative law judge), that such use will have no significant adverse impact upon subsistence uses of the species and the regulations of such use will, to the maximum extent practicable, provide economic opportunities for the residents of rural coastal villages of Alaska who engage in subsistence uses of that species.

Section 109(f)(2) defines the term "subsistence uses" as the customary and traditional uses by rural Alaska residents of marine mammals for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles out of non-edible by-products taken for personal or family consumption; and for barter, or sharing for personal or family consumption.

The Committee believes that the issue of subsistence taking must be addressed in Alaska's management program, given the importance of that take to persons dependent upon subsistence taking and given the history of court cases surrounding the authority of the state to regulate subsistence taking by Alaskan Natives. If management of a marine mammal species is returned to the State of Alaska, Native takings should be blended into the overall state regulatory regime. It should be emphasized that H.R. 4084 submits Native taking to state regulation only as part of a state management program which has been approved by the Secretary and only for so long as that program is in effect. Prior to implementation of the Alaska State program or subsequent to revocation of state management authority by the Secretary, Native taking of a species shall be subject to the provisions of sections 101(b) and 109(i).

The Committee is cognizant of the similarity of section 109(f) to certain provisions in Title 8 of the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487. Section 109(f)(1)(A), for example, is intended to establish a subsistence priority similar, but not identical, to the subsistence priority established in section 804 of ANILCA. The Committee wishes to emphasize that this subsistence priority is intended to operate in the same manner as the subsistence priority set forth in section 804 of ANILCA. The priority requires that all subsistence uses of a species be satisfied before the state may authorize any non-subsistence taking. It should be noted, however, that the Marine Mammal Protection Act subsistence priority differs from the ANILCA priority in that customary trade is not included within the purview of section 109. The section 109(f)(2) definition of subsistence uses is identical to the definition of the same term in section 803 of ANILCA in that it defines subsistence uses as the customary and traditional uses by rural Alaska residents for the personal and family consumption purposes set forth in section 803. The removal of customary trade from the subsistence use definition is not intended to

diminish the Committee's recognition of the importance of customary trade of marine mammals in many rural Alaska villages.

With respect to the non-subsistence harvest of marine mammals, section 109(f)(1)(B)(i) requires the State of Alaska to determine that all subsistence uses will be satisfied and that a non-subsistence harvest will not adversely affect the subsistence harvest to a significant degree before the State may adopt any regulations authorizing a non-subsistence harvest. Section 109(f)(1)(B)(ii) requires that the regulation of non-subsistence uses provide, to the maximum extent practicable, economic opportunities for the residents of the rural coastal villages of Alaska who engage in subsistence uses because the economies of certain villages are substantially dependent upon the harvest of marine mammals. If, for example, the State determines that all subsistence uses of walrus in a particular area can be satisfied and still allow a non-subsistence harvest, the State must determine whether the residents of the local villages desire and are capable of harvesting all of the non-subsistence surplus. If so, section 109(f)(1)(B)(ii) requires that State regulations structure the non-subsistence harvest so as to provide economic opportunities for the residents of rural coastal villages who engage in subsistence uses of that species. The economic opportunities referred to include not only the opportunity to take the animals, but also the opportunity to serve as marine mammal hunting guides. The State may not authorize a guided hunt for any marine mammal species until the state has done everything practicable to license the residents of coastal villages of the affected area. If competent and knowledgeable local residents are available, they must be licensed.

Section 109(g), as amended by section 4(a), provides that the National Environmental Policy Act shall not be applicable to the transfer of management authority to a state or to the revocation or voluntary return of such authority from the state to the Federal Government. The Committee wishes to emphasize that section 109(g) also applies to the process provided for in section 109(c).

Section 109(h) essentially restates existing law, except that, as rewritten, subsection (h) clarifies that Federal, as well as state or local employees, may take marine mammals in the course of their official duties and clarifies that the non-lethal removal of nuisance animals may also be carried out by Federal, state or local government employees. For example, the appropriate governmental employees may remove harbor seals trapped in fish ladders.

Section 109(i) authorizes the Secretary, after providing notice and opportunity for a hearing in the affected area, to prescribe regulations requiring the marking, tagging, and reporting of marine mammals taken by Alaskan natives pursuant to section 101(b). This provision is designed to enable the Secretary to gather sufficient data on the taking of marine mammals by Alaskan Natives to determine what effect such taking is having on marine mammal populations. The marking and tagging of animals will also provide the Secretary with a means of monitoring the disposition of the Native harvest to ensure that any commercial use of marine mammal products meets the criteria set forth in section 101(b)(2). In addition to the normal

rulemaking requirements of the Administrative Procedures Act, section 109(i) requires rulemaking to be preceded by public notice (which is reasonably calculated to reach the residents of Alaska's rural villages in a timely manner) and by an opportunity for a public hearing in the affected area. These additional procedural requirements recognize the unique logistical and communications problems in rural Alaska, and the importance of providing local village people—many of whom are unfamiliar with normal written rulemaking procedures—with an opportunity to express their views orally on proposed rulemaking within their own communities. It is not intended that the requirement to provide notification through "appropriate electronic means" mandate the use of expensive television and radio commercials.

Section 109(j) rewrites existing law to authorize the Secretary to make grants to assist states in developing, as well as in implementing, state management programs. Current law restricts eligibility for these grants to implementing an approved state program. It was the Committee's view that it would be in the best interest of the Act to permit states to receive funds for the development of management programs. Grants made under this subsection may not exceed 50 percent of the costs of developing or implementing state programs.

Section 4(b) of H.R. 4084 provides that nothing in the amendments made by section 4(a) shall be construed as affecting in any manner any cooperative agreement entered into by a state under section 6(e) of the Endangered Species Act of 1973. Of particular concern to the Committee was the possibility that H.R. 4084 would be interpreted as invalidating section 6(e) cooperative agreements entered into for the conservation and management of the endangered manatee in the State of Florida. Section 4(b) will preclude this result. The Committee also notes that section 17 of the Endangered Species Act provides that, in the case of conflicts between the Endangered Species Act and the Marine Mammals Protection Act, the more restrictive provision applies. Nothing in H.R. 4084 is intended to alter that result.

#### SECTION 5

Section 5 of H.R. 4084 amends section 110(a) of the Act to direct the Secretary to undertake a program of, and provide financial assistance for, research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals. At present, section 110(a) authorizes the Secretary to make grants to other agencies or persons for marine mammal research. As amended, section 110(a) would direct the Secretary to continue that function as well as to undertake a program of research on his own. The marine mammal research required by this section specifically includes research into new methods of locating and catching yellowfin tuna by purse seine vessels without the incidental take of marine mammals. Research involving aggregating devices is now being undertaken and the purpose of this amendment, among other things, is to encourage the continuation of that research. The tuna industry is presently engaged in such research, and the amendment to section 110(a) would expressly make it possible

for the government to participate in, or support, that research as well as other projects to discover better technology to avoid conflicts between marine mammals and the fishing industry.

#### SECTION 6

Section 6 of H.R. 4084 makes technical amendments to Title II of the Act which establishes, and specifies the functions of, the Marine Mammal Commission. Specifically, section 6 repeals the requirement that the Commission submit a copy of any report or recommendation to the Secretary before publication and clarifies that the Commission, in carrying on its responsibilities under the Act may make grants to persons.

#### SECTION 7

Section 7 of H.R. 4084 amends the Act to authorize \$8,000,000 for fiscal year 1983 and \$8,800,000 for fiscal year 1984 for the Department of Commerce. Section 7 further amends the Act to authorize, for the Department of the Interior, \$1,760,000 for fiscal year 1983 and \$2,000,000 for fiscal year 1984. Finally, section 7 authorizes the appropriation of \$1,000,000 in fiscal year 1983 and \$1,100,000 in fiscal year 1984 for the Marine Mammal Commission to carry out its responsibilities under the Act.

The Committee decided to eliminate the division of authorizations of appropriations for research and authorizations for other purposes. For bureaucratic reasons peculiar to their own institutions, the Departments of Commerce and the Interior interpreted these provisions differently. The Committee intends that the agencies continue to carry on active research programs at approximately the same level as their current programs. The Committee also notes that return of management of a species of marine mammals to a state should not preclude Federal research on that species. Almost all marine mammals spend some portions of their life cycle in Federal waters. Their role in the marine ecosystem and their aesthetic and economic values are factors which make them appropriate subjects for research on the Federal level. The Committee also notes that, because the Federal Government may be called upon to resume management at any time, Federal research, in cooperation with state agencies, should continue.

#### COST OF THE LEGISLATION

In the event that this legislation is enacted into law, the Committee estimates the cost to the Federal Government to be not in excess of \$10,760,000 in fiscal year 1983 and \$11,900,000 in fiscal year 1984.

#### INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 4084 would have no significant inflationary impact on the prices and cost in the national economy.

## COMPLIANCE WITH CLAUSE 2(1)(3) OF RULE XI

With respect to the requirements of clause 2(1)(3) of Rule XI of the Rules of the House of Representatives:

(A) A day of hearing was held on the legislation on July 13, 1981, by the Subcommittee on Fisheries and Wildlife Conservation and the Environment. Oversight hearings are planned in the next Congress.

(B) The requirements of Section 308(a) of the Congressional Budget Act of 1974 are not applicable to this legislation.

(C) The Committee on Government Operations has sent no report to the Committee on Merchant Marine and Fisheries pursuant to clause 2(b)(2) of Rule X.

(D) A letter was received from the Director of the Congressional Budget Office, pursuant to Section 403 of the Congressional Budget Act of 1974 in reference to H.R. 4084 and follows herewith:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
Washington, D.C. September 10, 1981.

Hon. WALTER B. JONES,  
Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, Longworth House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for H.R. 4084, a bill to improve the operation of the Marine Mammal Protection Act of 1972, and for other purposes.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin, Director.

## CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: H.R. 4084.
2. Bill title: A bill to improve the operation of the Marine Mammal Protection Act of 1972, and for other purposes.
3. Bill status: As ordered reported by the House Committee on Merchant Marine and Fisheries, July 31, 1981.
4. Bill purpose: This bill contains numerous technical and other amendments to the Marine Mammal Protection Act of 1972 (MMPA) to improve the administration of that act. The bill provides total authorizations of \$10.8 million in 1983 and \$ 1.9 million in 1984 to the Departments of Commerce and the Interior and to the Marine Mammal Commission for carrying out the provisions of the MMPA. The Marine Mammal Commission provides overview and review functions and makes recommendations to the Secretaries of Commerce, Interior, and State with regard to marine mammal conservation. The Departments of Commerce and Interior conduct research, provide grants to States, institutions, and individuals, prescribe regulations, and issue permits authorizing the taking or importing of marine mammals.

## 5. Cost estimate:

Fiscal year:	Authorization level:	Millions
1982	-----	-----
1983	-----	\$10.8
1984	-----	11.9
1985	-----	-----
1986	-----	-----
Estimated outlays:		
Fiscal year:		
1982	-----	-----
1983	-----	9.8
1984	-----	11.7
1985	-----	1.7
1986	-----	-----

The costs of this bill fall within budget subfunction 306.

6. Basis of estimate: The authorization levels are those stated in the bill. It is assumed that the full amounts authorized will be appropriated prior to the beginning of each fiscal year. Outlay estimates are based on information provided by the Department of Commerce and historical spending patterns.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Anne E. Hoffman.

10. Estimate approved by:

C. G. NUCKOLS

(For James L. Blum, Assistant Director for Budget Analysis).

## AGENCY COMMENTS

The Committee requested, but did not receive, any official statement of agency position on the legislation. Representatives of the Departments of Commerce, Interior and the Marine Mammal Commission were generally supportive of the goals of the legislation at hearings held before the committee.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

## MARINE MAMMAL PROTECTION ACT

(16 U.S.C. 1361-2, 1371-2, 1375, 1379-80, 1402, 1406)

## § 1361. Congressional Findings and Declaration of Policy.

The Congress finds that—

(a) 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.

#### § 1362. Definitions.

For the purposes of this chapter—

[(1) The term “depletion” or “depleted” means any case in which the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter II of this chapter, determines that the number of individuals within a species or population stock—

[(A) has declined to a significant degree over a period of years;

[(B) has otherwise declined and that if such decline continues, or is likely to resume, such species would be subject to the provisions of the Endangered Species Act of 1973; or

[(C) is below the optimum carrying capacity for the species or stock within its environment.

(1) The term “depletion” or “depleted” means any case in which—

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

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

(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973.

(2) The terms “conservation” and “management” means the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at [the optimum carrying capacity of their habitat] their optimum sustainable population. Such terms include the entire scope of activities that constitute a modern scientific resource program, including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within these terms, when and where appropriate, is the periodic or total protection of species or populations as well as regulated taking.

[(8) The term “optimum carrying capacity” means the ability of a given habitat to support the optimum sustainable population of a species or population stock in a healthy state without diminishing the ability of the habitat to continue that function.]

[(9)](8) The term “optimum sustainable population” means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or 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.

[(10)](9) The term “person” includes (A) any private person or entity, and (B) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

[(11)](10) The term “population stock” or “stock” means a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature.

[(12)](11) The term “Secretary” means—

(A) the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating, as to all responsibility, authority, funding, and duties under this chapter with respect to members of the order Cetacea and members, other than walrus, of the order Pinnipedia, and

(B) the Secretary of the Interior as to all responsibility, authority, funding, and duties under this chapter with respect to all other marine mammals covered by this chapter.

[(13)](12) The term “take” means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

[(14)](13) [The term “United States” includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, the possessions of the United States, and the Trust Territory of the Pacific Islands.] The term “United States” includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, American Samoa, Guam, and the Northern Mariana Islands.

[(15)](14) The term “waters under the jurisdiction of the United States” means—

(A) the territorial sea of the United States, and

(B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the outer boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

#### § 1371. Moratorium on Taking and Importing Marine Mammals and Marine Mammal Products.

##### (a) Imposition; Exceptions.

There shall be a moratorium on the taking and importation of marine mammal products, commencing on the effective date of this Act, during which time no permit may be issued for the taking of any marine mammals and no marine mammal or marine mammal product may be imported into the United States except in the following cases:

(1) Permits may be issued by the Secretary for taking and importation for purposes of scientific research and for public display if—

(A) the taking proposed in the application for any such permit, or

(B) the importation proposed to be made, is first reviewed by the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established

under subchapter II of this chapter. The Commission and Committee shall recommend any proposed taking or importation which is consistent with the purposes and policies of section 1361 of this title. The Secretary shall, if he grants approval for importation, issue to the importer concerned a certificate to that effect which shall be in such form as the Secretary of the Treasury prescribes and such importation may be made upon presentation of the certificate to the customs officer concerned.

[(2) During the twenty-four calendar months initially following October 21, 1972, the taking of marine mammals incidental to the course of commercial fishing operations shall be permitted, and shall not be subject to the provisions of sections 1373 and 1374 of this title: *Provided*, That such taking conforms to such conditions and regulations as the Secretary is authorized and directed to impose pursuant to section 1381 of this title to insure that those techniques and equipment are used which will produce the least practicable hazard to marine mammals in such commercial fishing operations. Subsequent to such twenty-four months, marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued thereof pursuant to section 1374 of this title, subject to regulations prescribed by the Secretary in accordance with section 1373 of this title. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate. The Secretary shall request the Committee on Scientific Advisors on Marine Mammals to prepare for public dissemination detailed estimates of the numbers of mammals killed or seriously injured under existing commercial fishing technology and under the technology which shall be required subsequent to such twenty-four-month period.]

(2) *Marine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefor under section 104 subject to regulations prescribed by the Secretary in accordance with section 103. In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate; provided that this goal shall be satisfied in the case of the incidental taking of marine mammals in the course of purse seine fishing for yellowfin tuna by a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.* The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. The Secretary shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing tech-

nology in use for such fish or fish products exported from such nation to the United States.

(3) (A) The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals, to determine when, to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal, or any marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 1372, 1373, 1374, and 1381 of this title permitting and governing such taking and importing, in accordance with such determinations: *Provided, however*, That the Secretary, in making such determinations must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter: *Provided further, however*, That no marine mammal or no marine mammal product may be imported into the United States unless the Secretary certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of this chapter. Products of nations not so certified may not be imported into the United States for any purpose, including processing for exportation. (B) Except for scientific research purposes as provided for in paragraph (1) of this subsection, during the moratorium no permit may be issued for the taking of any marine mammal which [is classified as belonging to an endangered species or threatened species pursuant to the Endangered Species Act of 1973 or] has been designated by the Secretary as depleted, and no importation may be made of any such mammal.

(4) (A) *During any period of 5 consecutive years, the Secretary shall allow the incidental, but not the intentional, taking, by citizens of the United States while engaging in commercial fishing operations, of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice and opportunity for public comment—*

(i) *finds that the total of such taking during such 5-year period will have a negligible impact on such species or stock; and*

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

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

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

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

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

(5) (A) Upon request therefor by citizens of the United States who engage in a specified activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens while engaging in that activity within that region of small numbers of marine mammals of a species or population stock that is not depleted if the Secretary, after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media, in the coastal areas that may be affected by such activity) and opportunity for public comment—

(i) finds that the total of such taking during each 5-year (or less) period concerned will have a negligible impact on such species or stock and its habitat, and on the availability of such species or stock for taking for subsistence uses pursuant to subsection (b) or section 109(f); and

(ii) prescribes regulations setting forth—

(I) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance; and

(II) requirements pertaining to the monitoring and reporting of such taking.

(B) The Secretary shall withdraw, or suspend for a time certain, (either on an individual or class basis, as appropriate) the permission to take marine mammals under subparagraph (A) pursuant to a specified activity within a specified geographical region if the Secretary finds, after notice and opportunity for public comment (as required under subparagraph (A) unless (C) (i) applies), that—

(i) the regulations prescribed under subparagraph (A) regarding methods of taking, monitoring, or reporting are not being substantially complied with by a person engaging in such activity; or

(ii) the taking allowed under subparagraph (A) pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.

(C) (i) The requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well being of the species or stock concerned.

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

## (b) Exemptions for Alaskan natives.

[The provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—]

Except as provided in section 109, the provisions of this Act shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—

[(1) is for subsistence purposes by Alaskan natives who reside in Alaska, or]

(1) is for subsistence purposes; or

\* \* \* \* \*

## § 1372. Prohibitions.

### (a) Taking.

Except as provided in sections 1371, 1373, 1374, 1379, 1381, and 1383 of this title, it is unlawful—

(1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas;

(2) except as expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before the effective date of this subchapter or by any statute implementing any such treaty, convention, or agreement—

(A) for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States; or

(B) for any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose in any way connected with the taking or importation of marine mammals or marine mammal products; and

[(3) for any person, with respect to any marine mammal taken in violation of this subchapter—

(A) to possess any such mammal; or

(B) to transport, sell, or offer for sale any such mammal or any marine mammal product made from any such mammal; and]

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

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

[(4)] (5) for any person to use, in a commercial fishery, any means or methods of fishing in contravention of any regulations or limitations, issued by the Secretary for that fishery to achieve the purposes of this chapter.

**(b) Importation of pregnant or nursing mammals; depleted species or stock; inhumane taking.**

Except pursuant to a permit for scientific research issued under section 1374(c) of this title, it is unlawful to import into the United States any marine mammal if such mammal was—

- (1) pregnant at the time of taking;
- (2) nursing at the time of taking, or less than eight months old, whichever occurs later;
- (3) taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock [or which has been listed as an endangered species or threatened species pursuant to the Endangered Species Act of 1973]; or

**(d) Nonapplicability of prohibitions.**

Subsections (b) and (c) of this section shall not apply—

- (1) in the case of marine mammals or marine mammal products, as the case may be, to which subsection (b) (3) of this section applies, to such items imported into the United States before the date on which the Secretary publishes notice in the Federal Register of his proposed rulemaking with respect to the designation of the species or stock concerned as depleted [or endangered]; or

**§ 1375. Penalties.**

(a) (1) Any person who violates any provision of this subchapter or of any permit or regulation issued thereunder may be assessed a civil penalty by the Secretary of not more than \$10,000 for each such violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking or importation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action.

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

**§ 1379. Federal cooperation with States.**

**[(a) State regulation of the taking of marine mammals.]**

[(1) Except as otherwise provided in this section, no State may adopt any law or regulation relating to the taking of marine mammals

within its jurisdiction or attempt to enforce any State law or regulation relating to such taking.

[(2) Any State may adopt and enforce any laws or regulations relating to the protection and taking, within its jurisdiction, of any species or population stock of marine mammals if the Secretary determines, after review thereof, that such laws and regulations will be consistent with (A) the regulations promulgated under section 1373 of this title with respect to such species or population stock, and (B) such other provisions of this chapter, and any rule or regulation promulgated pursuant to this subchapter, which apply with respect to such species or population stock. If the Secretary determines that any such State laws and regulations are so consistent, the provisions of this chapter, except this section and sections 1371 (except to the extent that the Secretary waives the application of section 1371 to permit such State laws and regulations to take effect) and 1380 of this title, and subchapter II of this chapter, shall not apply with respect to the species or population stock concerned within the jurisdiction.

[(3) Notwithstanding the preceding provisions of this subsection and the provisions of subsection (c) of this section, the Secretary shall continuously monitor and review the laws and regulations of any State which has assumed responsibility for marine mammals as provided for in paragraph (2) of this subsection. Whenever the Secretary finds that the laws and regulations of any such State are not in substantial compliance with either paragraph (1) or (2), or both, he shall resume responsibilities under this chapter for the marine mammals concerned within the jurisdiction of that State, superseding such State laws and regulations to the extent which, after notice and opportunity for hearing, he deems necessary.

[(4) Nothing in this chapter shall prevent a State or local government official or employee, in the course of his duties as an official or employee, from taking a marine mammal in a humane manner if such taking (A) is for the protection or welfare of such mammal or for the protection of the public health and welfare, and (B) includes steps designed to insure the return of such mammal to its natural habitat.

**[(b) Grants to States.]**

[(The Secretary is authorized to make grants to each State whose laws and regulations relating to protection and management of marine mammals which primarily inhabit waters or lands within the boundaries of that State are found to be consistent with the purposes and policies of this chapter. The purpose of such grants shall be to assist such States in developing and implementing State programs for the protection and management of such marine mammals. Such grants shall not exceed 50 per centum of the costs of a particular program's development and implementation. To be eligible for such grants, State programs shall include planning and such specific activities, including, but not limited to, research, censusing, habitat acquisition and improvement, or law enforcement as the Secretary finds contribute to the purposes and policies of this chapter. The Secretary may also, as a condition of any such grant, provide that State agencies report at regular intervals on the status of species and populations which are the subject of such grants.)]

(a) *No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for*

purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b) (1).

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

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

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

(C) does not permit the taking of the species unless—  
(i) the State has determined, under a process consistent with the standards set forth in subsection (c)—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) incidentally in the course of commercial fishing operations (whether provided for under section 102 (a) (2) or (4)), or in the course of other specified activities provided for under section 101 (a) (5), in the zone described in section 3 (14)

(B), and

(ii) for scientific research or public display purposes (other than by, or on behalf of, the State), except that any taking authorized under a permit issued pursuant to section 101 (a) (1) after the date of the enactment of the 1981 amendment to this subsection allowing the removal of live animals from habitat within the State shall not be effective if the State agency disapproves, within 30 days after the date of issuance of the permit, such taking as being inconsistent with the State program; and

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

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

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

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

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

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

The State agency must give public notice of the hearing and make available to the public within a reasonable time before com-

mencing the hearing a list of the witnesses for the State and a general description of the documentation and other evidence that will be relied upon by such witnesses.

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

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

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

(2) If the State agency requests the Secretary to regulate the taking of a species to which paragraph (1) applies within the zone described in section 3(14)(B) for subsistence uses or for hunting, or both, in a manner consistent with the regulation by the State agency of such taking within the State, the Secretary shall adopt, and enforce within such zone, such of the State agency's regulatory provisions as the Secretary considers to be consistent with his administration of section 101(a) within such zone. The Secretary shall adopt such provisions through the issuance of regulations under section 553 of title 5, United States Code, and with respect to such issuance the Regulatory Flexibility Act, the Paperwork Reduction Act, Executive Order No. 12291, dated February 17, 1981, and the 30-day review requirement in subsection (d) of such section 553 shall not apply. For purposes of sections 105, 106, and 107, such regulations shall be treated as having been issued under this title.

(e) (1) Subject to paragraph (2), the Secretary shall revoke, after opportunity for a hearing, any transfer of management authority made to a State under subsection (b) (1) if the Secretary finds that the State program for the conservation and management of the species concerned is not being implemented, or is being implemented in a manner inconsistent with the provisions of this section or the provisions of the program. The Secretary shall also establish a procedure for the voluntary return by a State to the Secretary of species management authority that was previously transferred to the State under subsection (b) (1).

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

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

(ii) during the 90-day period after the date of the notice of intent to revoke—

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

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

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

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

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

- (i) is accomplished in a nonwasteful manner,
- (ii) will be the priority consumptive use of the species, and
- (iii) if required to be restricted, such restriction will be based upon—

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

(II) local residency, and

(III) the availability of alternative resources; and

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

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

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

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

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

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

- (i) for other wildlife or fish or their parts, or
- (ii) for other food or feed or edible items other than money if the exchange is of a limited and noncommercial nature.

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

(h) Nothing in this title shall prevent a Federal, State, or local government official or employee or a person designated under section 112(c) from taking, in the course of his duties as an official, employee, or designee, a marine mammal in a humane manner (including euthanasia) if such taking is for—

- (1) the protection or welfare of the mammal,
- (2) the protection of the public health and welfare, or
- (3) the nonlethal removal of nuisance animals,

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

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

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

- (1) in developing programs to be submitted for approval under subsection (b), for the conservation and management of species of marine mammals; and
- (2) in administering such programs if management authority for such species is transferred to the State under such subsection. Grants made under this subsection may not exceed 50 percent of the costs of developing a State program before Secretarial approval, or of administering the program thereafter.

**[(c)] (k) Delegation of administration and enforcement to States.**

The Secretary is authorized and directed to enter into cooperative arrangements with the appropriate officials of any State for the delegation to such State of the administration and enforcement of this subchapter: Provided, That any such arrangement shall contain such provisions as the Secretary deems appropriate to insure that the purposes and policies of this chapter will be carried out.

**[(d)] (l) Authorization of appropriations.**

(1) There are authorized to be appropriated to the Department of the Interior, for the purposes of carrying out this section, not to exceed \$400,000 for each of the fiscal years ending September 30, 1980, and September 30, 1981.

(2) There are authorized to be appropriated to the Department of Commerce, for the purposes of carrying out this section, not to exceed \$225,000 for each of the fiscal years ending September 30, 1980, and September 30, 1981.

**§ 1380. Marine mammal research grants.**

(a) The Secretary is authorized to make grants, or to provide financial assistance in such other form as he deems appropriate, to any Federal or State agency, public or private institution, or other person for the purpose of assisting such agency, institution, or person to undertake research in subjects which are relevant to the protection and conservation of marine mammals.

In carrying out this subsection, the Secretary shall undertake a program of, and shall provide financial assistance for, research into new methods of locating and catching yellowfin tuna without the incidental taking of marine mammals. The Secretary shall include a description of the annual results of research carried out under this section in the report required under section 103(f).

**§ 1402. Duties; reports and recommendations; public information; explanation of non-adoption of recommendations.**

(a) The Commission shall—

(b) The Commission shall consult with the Secretary at such intervals as it or he may deem desirable, and shall [furnish its reports and recommendations to him, before publication, for his comment.] provide each annual report required under section 204, before submission to Congress, to the Secretary for comment.

**§ 1406. Administration.**

The Commission, in carrying out its responsibilities under this subchapter, may—

- (1) employ and fix the compensation of such personnel;
- (2) acquire, furnish, and equip such office space;
- (3) enter into such contracts or agreements with, or provide such grants to, other organizations, both public and private;

MEMORANDUM

To : Rep. Jack Fuller  
From : Ken Hamm, Legislative Aide to *KH*  
Rep. Tony Vaska  
Date : March 5, 1982  
  
Re : MARINE MAMMAL GUIDING

Pursuant to your conversation with Norman Cohen on March 2, 1982, I have done some research into the issue of whether state law presently authorizes the Guide Board to issue guiding permits for marine mammal hunts in a manner which would satisfy the requirements of the Marine Mammal Protection Act Amendments of 1981. I conclude that the guide board lacks this authority at the present time and, unless the legislature makes statutory changes expanding the authority of the guide board to issue special guiding permits, any regulations made by the guide board which comply with the requirements of the MMPA will exceed their statutory authority under state law, and be vulnerable to legal challenge.

This memorandum will first review the relevant provisions of the MMPA amendments, and then review the guide board's present authority to issue special guiding permits. Next, the memorandum will analyze whether the board's present statutory authority allows them to promulgate regulations complying with the requirements set forth in the MMPA amendments. Finally, the memorandum will suggest legislation for you to consider which would expand the guide board's authority for issuing special guide permits so that it would have statutory authority to promulgate regulations which meet the requirements of the MMPA amendments.

I. THE MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 1982.

As you know, last fall Congress amended the Marine Mammal Protection Act. Enclosed is a copy of the House Committee on Merchant Marine and Fisheries' report which accompanied the amendments. You will note that the amendments are contained on pages 1 - 8 of the reports. The remaining pages of the report describe and explain various provisions of the amendment.

The amendments provide in part that the State of Alaska can regain management of marine mammals if it satisfies certain prerequisites. One of those prerequisites is that if there is to be any guiding for marine mammals "licensing of marine mammal hunting guides and the assignment of guiding areas will, to the maximum extent practicable, provide economic opportunities for the residents of the rural coastal villages of Alaska who engage in subsistence uses of the species." (See section 109(f)(1)(B)(ii) on page 6 of the report). In explaining what was meant by

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this section, the Committee's report stated:

. . . The State may not authorize a guided hunt for any marine mammal species until the State has done everything practicable to license the residents of coastal villages of the affected area. If competent and knowledgeable local residents are available, they must be licensed. (emphasis added). Page 29 of the report.

The State is allowed by section 109(f)(1)(B) to comply with section 109(f)(1)(B)(ii) by adopting either "a statute or regulation."

II. THE PRESENT AUTHORITY OF THE GUIDE BOARD TO ISSUE SPECIAL GUIDING PERMITS.

Since section 109(f)(1)(B) allows the state to comply with section 109(f)(1)(B)(ii) by adopting a regulation, an investigation must be made into whether state law grants the guide board legal authority to issue special guiding permits for marine mammal hunts in a manner and to a degree which satisfies the requirements of the MMPA amendments.

The only statute present authorizing the guide board to issue special guiding permits is AS 08.54.045, which provides:

This chapter does not limit the power of the board or its authorized designee, to issue a special guiding permit, in place of a guide license, to a person to guide in a specifically designated area, if the person is considered sufficiently experienced to perform the services of a guide and is limited solely by language barriers from securing a regular guide license. (emphasis added).

This statute authorizes the board to issue special guiding permits under extremely limited circumstances: the applicant is sufficiently experienced to perform the services of a guide and is limited solely by language barriers from securing a regular guide license. The issuance of special guiding permits for reasons other than the language barrier problem are permitted by neither this statute nor any other statute. And an agency created by the state, such as the guide board, has only those powers which the legislature gives to it. Consequently,

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the board's authority to issue special guiding permits is limited to those situations described in AS 08.54.045.

III. STATE LAW DOES NOT AUTHORIZE THE GUIDE BOARD TO ISSUE SPECIAL GUIDING PERMITS FOR MARINE MAMMALS IN A MANNER WHICH SATISFIES THE MARINE MAMMAL PROTECTION ACT'S AMENDMENTS.

As displayed above, currently the guide board has the authority to issue special guiding permits only when language barriers prevent an individual from otherwise securing a guide license. The MMPA amendments, on the other hand, require that, to the maximum extent practicable, marine mammal guide licenses be issued to residents of rural coastal villages of Alaska who engage in subsistence uses of the species.

In order to comply with the mandate of the MMPA amendments, therefore, state law must give the guide board wide-ranging authority to issue guiding permits for marine mammals to residents of rural coastal villages who engage in subsistence uses of the species. However, because state law authorizes the issuance of special guiding permits only when language barriers prevent a person from otherwise securing a guide license, any regulation which the guide board might promulgate which gives preference for guide licenses to rural coastal subsistence users would be beyond the scope of its statutory authority. Consequently, the regulations would be vulnerable to attack in court.

An example displays how AS 08.54.045 fails to give the guide board authority which is broad enough for them to comply with the MMPA amendments. Suppose a subsistence walrus hunter from Savoonga wants to guide marine mammal hunts. This person can not be issued a special guiding permit under regulations promulgated by the guide board under AS 08.54.045 if the hunter speaks English. However, under the MMPA amendments, this person should qualify for a permit, regardless of whether linguistic differences exist, because he/she is a resident of a rural coastal village who engages in subsistence activities. AS 08.54.045 therefore does not allow the guide board to license competent and knowledgeable local residents "to the maximum extent practicable," as required by the MMPA amendments. Persons who speak English, regardless of whether they are residents of rural coastal villages, cannot be given special guiding licenses pursuant to AS 08.54.045.

A comparison of the proposed marine mammal guiding permit regulations (a copy of which is enclosed) which the guide board has promised to implement with AS 08.54.045 reveals that the regulations, if adopted, would exceed the guide board's author-

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To: Rep. Jack Fuller  
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ity. Nowhere in the regulations is there any indication that the special permits would be issued because of language barriers, as required by AS 08.54.045. Consequently, although the regulations, if adopted, might bring the state into compliance with the language in the amendments to the MMPA, the regulation would exceed the guide board's statutory authority and could therefore be voided by a court.

IV. SUGGESTED AMENDMENTS.

There are two possible ways to amend AS 08.54 so the guide board has the authority to issue special marine mammal guiding permits. The first way is to amend AS 08.54.045. I do not recommend this alternative. This statute authorizes the guide board to issue special guiding permits for any species if language is the barrier. I think this statute should be kept as is so that the guide board retains the authority to issue special guide licenses for hunts for any species such as musk oxen. If the statute were amended to speak specifically to marine mammal hunts, then the guide board would lose the power to issue special guide licenses for species other than marine mammals.

The second way to amend AS 08.54 to authorize the guide board to issue special marine mammal hunts, is to pass brand new statutes. These statutes could be titled AS 08.54.046 - .048, as they seem to fit logically into the statutory framework at that location. Attached are my suggested amendments, in essence codifying the language in the regulations which were proposed by the Eskimo Walrus Commission.

As you know, the House Resources Committee last week passed out of committee CSHB 199 (2d Res), an act relating to guiding. This bill does not expand the guide board's authority to issue special marine mammal permits beyond the board's present authority. I think that procedurally this bill could be amended either in the Senate or the House, to reflect the suggested changes I've attached.

Sec. 08.54.046. Qualifications for and privileges and limitations of marine mammal guides.

(1) A person is entitled to be licensed as a marine mammal guide if he

(a) is 21 years of age or more;

(b) is a resident of the area of the state in which he is to guide;

(c) has legally hunted marine mammals in the state for all or part of each of ten years in a manner directly contributing to his experience and competency as a guide;

(d) has been a recognized boat captain for three years;

(e) is physically able to perform the services of a guide;

(f) has demonstrated to the board sufficient standards of competence and ethical conduct and has not been convicted of a crime involving moral turpitude;

(g) has passed a qualification examination, prepared and administered by the board or its agents, on the following subjects:

(ii) fish, game, and guiding laws and regulations;

(ii) relevant characteristics of the specific species of marine mammals to be hunted;

(iii) field preparation of trophies;

(iv) care of meat;

(v) firearm safety;

(vi) relevant characteristics of ice, ocean currents, and weather of the area in which the applicant is to guide;

(vii) practical first aid;

(viii) photography; and

(ix) booking and contracting.

(2) A marine mammal guide

(a) may sign statements of remuneration;

(b) shall be limited to two hunters in the field on any one hunt; and

(c) shall be held responsible for those same responsibilities as a master or registered guide under similar conditions.

Sec. 08.54.047. Qualifications for and privileges and limitations of assistant marine mammal guide licenses.

(1) A person is entitled to be licensed as an assistant marine mammal guide if he

(a) is 19 years of age or more;

(b) is a resident of the area of the state of which he is to guide;

(c) has legally hunted marine mammals in the state for all or part of each of seven years in a manner directly contributing to his experience and competency as an assistant guide;

(d) is physically able to perform the duties of an assistant marine mammal guide; and

(e) has been recommended in writing by a master, registered or marine mammal guiding permit holder.

(2) An assistant marine mammal guide

(a) may not contract hunts;

(b) may not conduct a hunt; and

(c) shall be under the immediate supervision of the marine mammal guide by whom he is employed and/or working with.

Sec. 08.54.048. Marine mammal and assistant marine mammal guide regulations. The guide board shall promulgate regulations implementing AS 08.54.046 - .047. These regulations shall ensure that, to the maximum extent practicable, guiding for marine mammals will be done by residents of the rural coastal villages of the State who engage in subsistence uses of that species.

Original sponsor: Rules/Governor

Offered: 3/5/82  
Referred: Finance

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 199 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to guiding; and providing for an  
7 effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 08.01.010(20) is amended to read:

10 (20) Guide [LICENSING AND CONTROL] Board;

11 \* Sec. 2. AS 08.03.010(c)(20) is amended to read:

12 (20) Guide [LICENSING AND CONTROL] Board (AS 08.54.010) --  
13 June 30, 1984 [1982].

14 \* Sec. 3. AS 08.54.010 is amended to read:

15 ARTICLE 1. GUIDE [LICENSING AND CONTROL] BOARD.

16 Sec. 08.54.010. CREATION AND MEMBERSHIP OF BOARD. For the pur-  
17 poses of licensing and regulating the activities of guides in the best  
18 interests of the state's wildlife resources, there [THERE] is created  
19 in the Department of Commerce and Economic Development the Guide [LI-  
20 CENSING AND CONTROL] Board consisting of seven members. Three members  
21 of the board must be licensed registered or master guides who are ac-  
22 tively involved in the guiding profession. The other members of the  
23 board shall be knowledgeable and experienced with the fish and game  
24 resources of the state but may not be licensed guides. Each member  
25 shall have been a resident of the state for at least 10 years [NO MORE  
26 THAN THREE MEMBERS OF THE BOARD SHALL HAVE A GUIDE LICENSE. THE OTHER  
27 MEMBERS SHALL HAVE A GENERAL KNOWLEDGE OF THE GAME RESOURCES OF THE  
28 STATE. A MINIMUM OF 10 YEARS RESIDENCE IN THE STATE IS REQUIRED FOR  
29 ALL MEMBERS OF THE BOARD].

1 \* Sec. 4. AS 08.54.020 is amended to read:

2 Sec. 08.54.020. APPOINTMENT AND TERM OF OFFICE. The members of  
3 the board shall be appointed by the governor and confirmed by the  
4 legislature for staggered terms of three years or until their successors  
5 are appointed. [INITIAL TERMS ARE AS FOLLOWS: THREE MEMBERS FOR ONE  
6 YEAR, TWO MEMBERS FOR TWO YEARS, AND TWO MEMBERS FOR THREE YEARS.] A  
7 memb r may be removed at the pleasure of the governor.

8 \* Sec. 5. AS 08.54.030 is amended to read:

9 Sec. 08.54.030. CHAIRMAN OF THE BOARD. The board shall elect one  
10 of its members to serve as chairman for a period of two years. If a  
11 chairman resigns or his term as a board member expires sooner than two  
12 years after his election as chairman and he is not reappointed to the  
13 board, the board may elect an acting chairman. When all vacancies on  
14 the board are filled, the board shall elect a new chairman.

15 \* Sec. 6. AS 08.54 is amended by adding a new section to read:

16 Sec. 08.54.035. QUORUM: REQUIRED MAJORITY VOTE. Four members of  
17 the board constitute a quorum for the transaction of business, for the  
18 performance of any duty, and for the exercise of any power under this  
19 chapter. However, the board may not adopt a regulation, revoke, sus-  
20 pend, or deny renewal of a license, unless the action is approved by a  
21 vote of a majority of the full membership of the board.

22 \* Sec. 7. AS 08.54.040(a)(2) is amended to read:

23 (2) determine [AND PASS ON] qualifications of applicants for  
24 licenses and authorize the issuance of licenses to those who qualify;

25 \* Sec. 8. AS 08.54.040(a)(4) is amended to read:

26 (4) compile, maintain and publish a [GUIDE] register of  
27 guides who have not been convicted of a violation of a [FEDERAL OR]  
28 state hunting [SPORT FISH, GAME,] or guiding statute or regulation  
29 during the five years immediately preceding publication. [A GUIDE

*to be added to the information*

1 LISTED IN THE REGISTER WHOSE LICENSE IS REVOKED OR SUSPENDED SHALL BE  
2 REMOVED FROM THE REGISTER WHILE HIS LICENSE IS REVOKED OR SUSPENDED;]

3 \* Sec. 9. AS 08.54.040(a)(5) is repealed and reenacted to read:

4 (5) collect and maintain records of hunts conducted by  
5 guides; *a publish; in last 3 years*

6 \* Sec. 10. AS 08.54.040(b) is amended to read:

7 (b) If a person is unable to competently understand the written  
8 portion of an examination given under (a)(1) of this section, the board  
9 shall substitute a special oral examination [HE SHALL BE GIVEN THE COM-  
10 PLETE EXAMINATION ORALLY IN A LANGUAGE WHICH HE UNDERSTANDS].

11 \* Sec. 11. AS 08.54.110(8) is amended to read:

12 (8) has been licensed as and performed the services of an  
13 assistant guide or a special guide in the state for a part of each of  
14 three years;

15 \* Sec. 12. AS 08.54 is amended by adding a new section to read:

16 Sec. 08.54.141. PRIVILEGES AND LIMITATIONS OF ASSISTANT GUIDES.

17 An assistant guide

18 (1) may not contract for guided hunts; and

19 (2) shall be supervised by a registered or master guide at  
20 all times while the assistant guide is in the field on guided hunts.

21 \* Sec. 13. AS 08.54.170 is amended to read:

22 Sec. 08.54.170. ANNUAL [LICENSE] FEES. (a) Annual [LICENSE]  
23 fees for engaging in the profession of guiding are:

- 24 (1) master guide license [, ANNUAL] .....\$75
- 25 (2) registered guide license [, ANNUAL] ..... 75
- 26 (3) class-A assistant guide license [, ANNUAL] ..... 15
- 27 (4) assistant guide licens. [, ANNUAL] ..... 10
- 28 (5) special guide license ..... 25

29 (b) The annual [LICENSE] fee for a master guide, registered

1 guide, special guide, class-A assistant guide, or assistant guide  
2 license is in addition to the fee required for a hunting or fishing  
3 license.

4 [(c) THE LICENSE FEE FOR A TRANSPORTER IS \$10.]

5 \* Sec. 14. AS 08.54 is amended by adding a new section to read:

6 Sec. 08.54.186. REGISTERED GUIDE EXAMINATION. The board shall  
7 administer the qualification examination required under AS 08.54.110 at  
8 least twice a year. At least once every other year the board shall  
9 give the examination at a location other than Anchorage.

10 \* Sec. 15. AS 08.54.190(a) is amended to read:

11 (a) A master guide, registered guide, special guide, class-A  
12 assistant guide, or assistant guide [OR TRANSPORTER] license expires on  
13 December 31, following issuance.

14 \* Sec. 16. AS 08.54.200(a) is amended to read:

15 (a) The board shall hold a hearing to determine if disciplinary  
16 action is necessary if during the five years immediately preceding the  
17 date of the hearing

18 (1) complaints concerning the licensee's guiding activities  
19 [LICENSEE] have been filed with the board or other state agency from  
20 three or more clients of separate parties and the division of fish and  
21 wildlife protection, Department of Public Safety, finds after investi-  
22 gation that the complaints appear to be valid; or

23 (2) [A LICENSEE HAS BEEN CHARGED WITH A VIOLATION OF FEDERAL  
24 OR STATE SPORT FISH, GAME OR GUIDE STATUTES OR REGULATIONS; OR]

25 (3) a licensee has been convicted of a violation of a  
26 [FEDERAL OR] state hunting or guiding [SPORT FISH, GAME OR GUIDE]  
27 statute or regulation.

28 \* Sec. 17. AS 08.54.200(b) is amended to read:

29 (b) After a hearing, the board may revoke, suspend, or deny

1 renewal of a license if the board finds that the licensee

2 (1) engaged in unethical activity, unsafe activity, or acti-  
3 vity which adversely affects the natural resources of the state when  
4 such activity is unrelated to the legal and legitimate purposes of the  
5 contract hunt; [OR]

6 (2) violated a provision of a [FEDERAL OR] state hunting  
7 [SPORT FISH, GAME] or guiding [GUIDE] statute or regulation.

8 \* Sec. 18. AS 08.54.200(c)(2) is amended to read:

9 (2) is incompetent as a master guide, registered guide,  
10 special guide, class-A assistant guide, or assistant guide;

11 \* Sec. 19. AS 08.54.200(c)(3) is repealed and reenacted to read:

12 (3) during the five years immediately preceding the date of  
13 the hearing has been convicted of a violation of a statute or regulation  
14 prohibiting

15 (A) wanton waste of a wild food animal under AS 16.-

16 30.010;

17 (B) hunting on the same day that the guide or his clients  
18 are airborne;

19 (C) hunting in an area closed under AS 16.05.255(a)(2);

20 or

21 (D) hunting during a hunting season closed under AS 16.-

22 05.255(a)(2).

23 \* Sec. 20. AS 08.54.200(d) is amended to read:

24 (d) A [NO] person who is disciplined under this section may not  
25 engage in any guiding [OR TRANSPORTING] activity during the period of  
26 license revocation or disciplinary action. A person licensed under this  
27 chapter may not hire a person whose license is suspended or revoked to  
28 guide, and a guide whose license is suspended or revoked may not guide  
29 in the employ of a person licensed under this chapter [NO PERSON LICENSED

*N6*

*NO - only  
state not  
final*

*original law  
changed by  
legislation*

1 UNDER THIS CHAPTER MAY HIRE OR WORK FOR A GUIDE WHOSE LICENSE IS SUS-  
2 PENDED OR REVOKED UNDER THIS SECTION].

3 \* Sec. 21. AS 08.54.200 is amended by adding new subsections to read:

4 (f) If a certified copy of a judgment of a conviction of a guide  
5 for a crime described in (c)(3) of this section is filed with the board,  
6 the board may immediately suspend the guide's license. The suspension  
7 may be ordered even if the conviction resulted from a plea of nolo  
8 contendere or the conviction is under appeal to a higher court. The  
9 order remains in effect until after the final disposition of the disci-  
10 plinary proceeding under this section.

11 (g) A certified copy of a judgment of conviction of a guide for  
12 any crime is conclusive evidence of the commission of that crime in any  
13 disciplinary proceeding instituted under this section.

14 \* Sec. 22. AS 08.54.210 is repealed and reenacted to read:

15 Sec. 08.54.210. UNLAWFUL ACTS. (a) It is unlawful for

16 (1) a master guide, registered guide, special guide, class-A  
17 assistant guide, or assistant guide to fail to report violations of a  
18 state hunting or guiding statute or regulation to the Department of  
19 Public Safety, division of fish and wildlife protection, within 30 days  
20 after becoming aware of the violations;

21 (2) a master guide, registered guide, special guide, class-A  
22 assistant guide, or assistant guide to aid the commission of a violation  
23 of this chapter or of AS 16.05 or a regulation adopted under either  
24 chapter, or permit the commission of a violation in his sight without  
25 attempting (short of using force) to prevent the violation;

26 (3) a person to advertise as or represent himself to be a  
27 licensed master guide, registered guide, special guide, class-A assis-  
28 tant guide, or assistant guide without being currently licensed, or to  
29 falsely advertise services;

1 (4) a person to guide without having a current valid hunting  
2 license in his possession;

3 (5) a master or registered guide to employ or have under his  
4 supervision more than four assistant guides who are simultaneously and  
5 actively guiding;

6 (6) a person to guide without being licensed under this  
7 chapter;

8 (7) a person to guide during a period in which his license is  
9 suspended, revoked or lapsed under this chapter.

10 (b) A person who violates (a)(1) - (6) of this section is, upon  
11 conviction, guilty of a class A misdemeanor, and, in addition to the  
12 other penalties prescribed by law, the court may revoke the guide license  
13 for a period of up to five years.

14 (c) A person who violates (a)(6) or (7) of this section is, upon a  
15 second conviction of (a)(6) or a conviction of (a)(7), guilty of a class  
16 C felony, and, in addition to other penalties prescribed by law, the  
17 court may revoke the guide license for a period of up to five years. In  
18 addition to punishment for a felony, all guns, fishing tackle, boats,  
19 aircraft, automobiles or other vehicles, camping gear and other equipment  
20 and paraphernalia used in, or in aid of, a second violation of (a)(6) or  
21 a violation of (a)(7) of this section, shall be confiscated by persons  
22 authorized to enforce this chapter.

23 \* Sec. 23. AS 08.54.240(1) is amended to read:

24 (1) "board" means the Guide [LICENSING AND CONTROL] Board;

25 \* Sec. 24. AS 08.54.240(2) is repealed and reenacted to read:

26 (2) "to guide" or "guiding" means assisting another person in  
27 the field either directly or through an agent, employee, or associate in  
28 locating, taking, or attempting to take big game with the intent of  
29 receiving monetary or other material remuneration for the service;

1 \* Sec. 25. AS 08.54.240(4) is amended to read:

2 (4) "unethical activity" means

3 (A) deception or misrepresentation [IN ANY DEGREE] in-  
4 volving prospective or actual clients either before, during, or  
5 following a contract hunt including, but not limited to, misrepre-  
6 sentation through private or public advertising of the type, dura-  
7 tion, cost, or conditions of the contract hunt [HUNTS];

8 (B) [MISREPRESENTATION EITHER THROUGH PRIVATE COMMUNI-  
9 CATION OR PUBLIC ADVERTISING OF THE NATURE, TYPE, DURATION, COST,  
10 OR OTHER CONDITIONS OF CONTRACT HUNTS.]

11 (C) making a guaranty or money-back promise that a  
12 species or certain number of species of game will be taken on a  
13 contract hunt;

14 (D) unsafe or unsportsmanlike activities that are det-  
15 rimental to the game resources of the state, as defined by regula-  
16 tions of the board, including violations of state or federal hunt-  
17 ing, sport fishing, trapping, or guiding laws or regulations; [.]

18 \* Sec. 26. AS 08.54.142 - 08.54.146, 08.54.185, 08.54.240(5); and AS 16.-  
19 05.340(e) are repealed.

20 \* Sec. 27. The terms of the members of the Guide Licensing and Control  
21 Board are terminated as of the effective date of this Act. The members of  
22 the Guide Board shall be appointed by the governor in accordance with the  
23 provisions of AS 08.54 within 30 days of the effective date of this Act.  
24 Three of the members initially appointed to serve on the Guide Board shall be  
25 appointed to serve a one-year term, two members shall be appointed to serve a  
26 two-year term, and two members shall be appointed to serve a three-year term.

27 \* Sec. 28. The Guide Board shall elect a new chairman under AS 08.54.030  
28 not later than September 1, 1982.

29 \* Sec. 29. This Act takes effect July 1, 1982.

MEMORANDUM

TO: Representative Jack Fuller

From: Ken Hamm, <sup>KH</sup>Aide to  
Rep. Tony Vaska

Date: March 5, 1982

Re: Marine Mammal Guiding

In this packet is my analysis of whether state law presently authorizes the guide board to issue special marine mammal guide licenses in a manner which complies with the Marine Mammal Protection Act Amendments of 1982. I've enclosed with my analysis information relevant to this discussion.

Also included in this packet is a brief one page analysis of the situation done by the Division of Legal Services.

As you can see, both analyses reach the same conclusion: that amendments are needed to state law before the guide board can legally issue special guide permits for marine mammal hunts in a manner complying with the MMPA amendments.

The last three pages of my analysis consist of suggested changes to the guide law so the guide board will have this authority. Tony has submitted these pages to Legal Services and asked that they be put in a form which can be used as an amendment to CSHB 199(2d Res). I expect these amendments back from them early next week.

Reason for the proposed amendments: In late 1981 Congress amended the Marine Mammal Protection Act. These amendments provided that the State of Alaska could regain control of marine mammals provided the state satisfied certain prerequisites. One of those prerequisites is that, if there is to be any guided hunts on the species, that guide licenses be issued, to the maximum extent practicable, "to residents of the rural coastal villages of Alaska who engage in subsistence uses of that species."

The Guide Board met with the Eskimo Walrus Commission after Congress amended the MMPA. The Commission proposed certain regulations for the guide board to adopt which, if passed, would bring the state into compliance with the MMPA amendments concerning marine mammal guiding. The chairman of the guide board has assured Representative Jack Fuller that the board plans to adopt these regulations.

Unfortunately, unless amendments are made to the statutes, the guide board is without legal authority to adopt these proposed regulations. Consequently, if these regulations were adopted they would be vulnerable to legal challenge.

Consequently, these proposed amendments would codify the high points of the proposed regulations, thereby giving the guide board the authority to pass the proposed regulations.

In summary, the proposed amendments would give the guide board the authority to promulgate regulations which establish marine mammal guides and assistant marine mammal guides. The amendments also clarify that in making these regulations the guide board is to comply with the requirements of the marine mammal protection act amendments of 1981. Finally, the proposed amendments contain a number of housecleaning items. A section by section analysis follows.

Section 3. AS 08.54.010 would be broken down into two subsections. Subsection (a) creates the guide board in the Department of Commerce and Economic Development for the purposes of licensing and regulating the activities of guides. Unnecessary and confusing language is deleted.

Subsection (b) concerns the membership of the guide board. The only change made is that the governor would have the authority (although this would not be required) to appoint a marine mammal guide to the guide board.

AS 08.54.046.

Section 11. This is a new section, and establishes marine mammal licenses. Subsection (a) sets forth the requirements that a person must satisfy in order to become a marine mammal guide. This language is nearly identical to that proposed by the Eskimo Walrus Commission and agreed to by the Guide Board. Relatively minor changes were made to the wording to clarify vague language.

Subsection (b) establishes the privileges and limitations of marine mammal guides. Again, this language is similar to that proposed by the Eskimo Walrus Commission and agreed to by the guide board.

AS 08.54.047. This is a new section, establishing assistant marine mammal licenses. Section (a) sets forth the requirements that a person must satisfy in order to become an assistant marine mammal guide; section(b) establishes the privileges and immunities of assistant marine mammal guides.

Section 12. This establishes a new subsection in AS 08.54.050, pertaining to regulations made by the guide board. It requires that in adopting regulations from marine mammal guiding that they comply with the Marine Mammal Protection Act Amendments of 1981.

The remainder of the amendments concern housecleaning items.

## MARINE MAMMAL GUIDING PERMITS

### Sec. 08.54.045. Guiding Permit

That two guide classifications for marine mammals be established, those being "Marine Mammal Guide Permit" and "Assistant Marine Mammal Guide Permit." Marine mammals include those so designated by the Alaska Department of Fish and Game (walrus, polar bear, beluga whale, ribbon seal, sea lion, spotted seal, bearded seal, ringed seal and sea otter).

#### 1. Application and Examinations for Marine Mammal Guide

- A. Application for a Guide Permit for Marine Mammal must be made at least five months before the examination date on a form provided by the Guide Board. The application shall include a list of those guided hunts the applicant has participated in during his apprenticeship. A special provision shall be made for the initial application and examination under these provisions to allow for application prior to \_\_\_\_\_ to be completed without a designated waiting period.)
- B. Applications and examinations may be administered by authorized representatives of the Guide Board.
- C. Marine Mammal Guide Permits and Marine Mammal Assistant Guide Permit examinations will be administered orally, using a point system required. An applicant who fails the examination may not be reexamined for a period of six (6) months.

#### 2. Qualifications for MMGP

- A. Is 21 years of age or more.
- B. Is a resident of the area of the state in which he is to guide.
- C. Has legally hunted <sup>(marine mammals)</sup> in the state for all or part of each of ten years in a manner directly contributing to his experience and competency as a guide; and has been a recognized boat captain three years.
- D. Is physically able to perform the services of a guide.
- E. Has demonstrated to the board sufficient standards of competence and ethical conduct and has not been convicted of a crime involving moral turpitude.
- F. Has surpassed the qualification examination prepared and administered by the board or its agent(s), to include knowledge of the following:
  1. fish and game laws and regulations (add guiding regulations);
  2. relevant characteristics of the specific species of marine mammals to be hunted;
  3. relevant characteristics of the ice, ocean currents, and weather of the area in which the applicant is to guide;
  4. field preparation of trophies;
  5. care of meat;
  6. firearm safety;
  7. practical first aid;
  8. photography; and
  9. booking and contracting.

- A. Is 19 years of age or more.
- B. Is a resident of the area of the state of which he is to guide.
- C. Has legally hunted <sup>marine mammals</sup> in the state for all or part of each of seven years in a manner directly contributing to his experience and competency as an assistant guide.
- D. Is physically able to perform the duties of an assistant marine mammal guide.
- E. Has been recommended in writing by a master, registered, or marine mammal guiding permit holder.

4. Privileges and Limitations of Marine Mammal Guides

A. Marine Mammal Permit Holder

- 1. may sign statements of remuneration;
- 2. shall be limited to two hunters in the field on any one hunt; and
- 3. shall be held responsible for those same responsibilities as a master or registered guide under similar conditions.

B. Assistant Marine Mammal Guide Permit Holder

- 1. may not contract hunts; and
- 2. may not conduct a hunt, and shall be under the immediate supervision of the marine mammal guide by whom he is employed and/or working with.

STATE OF ALASKA  
 Department of Commerce and Economic Development  
 Division of Occupational Licensing  
 Pouch D  
 Juneau, Alaska 99811-0800

**MARINE MAMMAL GUIDE PERMIT APPLICATION**

(for Department use only)

+++++

Issued by \_\_\_\_\_ at \_\_\_\_\_ date \_\_\_\_\_ License No. \_\_\_\_\_

op NEW  
 op RENEWAL

MARINE MAMMAL  
 GUIDE PERMIT

ASSISTANT MARINE MAMMAL  
 GUIDE PERMIT

\$25.00  
 op

\$10.00  
 op

+++++

I, \_\_\_\_\_ of \_\_\_\_\_  
 (Print complete name) Mailing Address

\_\_\_\_\_ in accordance with the State of Alaska and the Guide Licensing and  
 City, State, Zip Code

Control Board hereby make application for the permit checked above, for the year ending December 31, 19\_\_\_\_

I have been a resident of Unit 27 in the State of Alaska for \_\_\_\_\_ years, and I have made my home in the state continuously since that time. (\*See definition of resident below.)

I have a Marine Mammal or Assistant Marine Mammal Guide Permit No. \_\_\_\_\_

MY PHYSICAL CHARACTERISTICS ARE: Date of Birth \_\_\_\_\_ Height \_\_\_\_\_ Weight \_\_\_\_\_

Hair Color \_\_\_\_\_ Eye Color \_\_\_\_\_ Sex \_\_\_\_\_ Social Security Number \_\_\_\_\_

AS 08.01.100(b) requires a \$10.00 penalty fee be paid for renewal of a license which has remained lapsed more than 60 days.

I hereby certify under the penalty of perjury that the above information is true and correct to the best of my knowledge.

\_\_\_\_\_  
 Signature of Applicant

\*\*\*\*\*  
 FOR NEW APPLICANTS ONLY

Subscribed and sworn to before me at \_\_\_\_\_ this day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
 Notary Public in and for the State of Alaska  
 My commission expires: \_\_\_\_\_

\*\*\*\*\*  
 "RESIDENT" means a person who maintains a place or residence within the state; has not claimed residency in another state for the immediately preceding 12 months; shows by all attending circumstances that his intent is to make this state his permanent residence.

APPLICATION FOR MARINE MAMMAL AND/OR ASSISTANT  
GUIDE PERMIT TEST

Complete and return to the Department of Safety, Fish and Wildlife Protection, Box 6188, Annex, Anchorage, Alaska 99502.

\*\*\*\*\*

Name: \_\_\_\_\_ Date: \_\_\_\_\_  
(type or print) (Last, First, M.I.)

Address: Mailing \_\_\_\_\_  
Residence \_\_\_\_\_

Phone: \_\_\_\_\_ Social Security No. \_\_\_\_\_ D.O.B. \_\_\_\_\_

Physical Description:

Height: \_\_\_\_\_' \_\_\_\_\_" Weight: \_\_\_\_\_ lbs. Hair Color \_\_\_\_\_ Eye Color \_\_\_\_\_

List names, addresses, and dates of all registered guides and/or marine mammal guide permittees for whom you have worked. (Use additional sheet if necessary.)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Have you been convicted of or charged with any fish, game or guiding violations within the past five years? If yes, give details: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Pending \_\_\_\_\_ Completed \_\_\_\_\_

Are you a resident of Unit 27 area? op Yes op No How long \_\_\_\_\_

Are you a citizen of the United States? op Yes op No

Physical impairments: \_\_\_\_\_  
\_\_\_\_\_

Have you had any serious problems with any of the clients, registered guides, or Marine Mammal guide permittees for whom you worked? If yes, submit details: \_\_\_\_\_  
\_\_\_\_\_

How many years have you hunted Unit 27 marine mammals? \_\_\_\_\_

How many years have you been recognized as a boat captain? \_\_\_\_\_

Submit along with this application recommendation(s) from registered and/or marine mammal guide permittees for whom you have worked.

Submit any additional information that may help make a fair evaluation.

I, \_\_\_\_\_ swear that all claims and statements made herein are true and that each question has been answered in its entirety.

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Notary Public in and for the State of Alaska  
My commission expires: \_\_\_\_\_

(for Registered Guide applicants)

CERTIFICATION OF APPRENTICESHIP  
Guide Licensing and Control Board  
Department of Commerce  
Pouch D  
Juneau, Alaska 99811

Should identify AS Master, Registered Guide or MARINE MAMMAL PERMITTEE

I, \_\_\_\_\_ hereby certify that \_\_\_\_\_ (Applicant)  
~~(AKN Guide Permittee)~~

has worked for me in the field on guided hunts for \_\_\_\_\_ number of days, from \_\_\_\_\_, 19\_\_ to \_\_\_\_\_, 19\_\_, and to my personal knowledge has had the following experience:

- 1. Experience in Unit 27  Yes  No
- 2. Has caped one or more big game animals  Yes  No
- 3. Has experience in care of meat  Yes  No
- 4. Has experience in care of trophies  Yes  No
- 5. Has knowledge of first aid  Yes  No
- 6. Has experience in care of firearms  Yes  No
- 7. Is familiar with Fish & Game and Guide regulations and statutes  Yes  No
- 8. List the species of big game animals applicant has personally taken:

\_\_\_\_\_  
(Signature of Guide) (Signature of Applicant)

\_\_\_\_\_  
(Address) (Address)

Subscribed and sworn before me at \_\_\_\_\_  
this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

Notary Public in and for the State of Alaska  
My Commission expires \_\_\_\_\_

12 AAC 38.140. REQUIREMENTS FOR A REGISTERED GUIDE LICENSE. In addition to the requirements of AS 08.54.110 to be qualified for a registered guide license, a person must: (1) demonstrate to the board that he has spent 90 days in the field acting as an assistant guide as certified by the master or registered guide who employed him.

THE INFORMATION CONTAINED HEREIN WILL BE INVESTIGATED BY FISH & WILDLIFE PROTECTION, DEPARTMENT OF PUBLIC SAFETY. PLEASE BE SPECIFIC AS TO DATES.

# STATE OF ALASKA

## DEPARTMENT OF COMMERCE & ECONOMIC DEVELOPMENT

DIVISION OF OCCUPATIONAL LICENSING

JAY S. HAMMOND, GOVERNOR

POUCH D  
JUNEAU, ALASKA 99811  
PHONE: (907) 465-2534

March 22, 1982

Representative Jack Fuller  
Alaska House of Representatives  
Pouch V  
Juneau, Alaska 99811

Dear Jack:

Your March 1 letter was delayed in being answered because I was out of the state and just returned.

I am happy to say that hearings for the marine mammal regulations are scheduled for April 5, 1982, at 8 AM, in Fairbanks, in the North Star Borough Building. It would be very helpful if you could relay this information to interested parties, such as the Walrus Commission and the Calisto Corporation in Anchorage.

I would like to mention again that, in my opinion, the requirement of a good guide program in the Arctic rests on the ability of the Guide Licensing & Control Board to at least meet once a year, for the next few years, in some Arctic village. I think it is really important that we communicate with each other and smooth out any problems that might occur.

For the Arctic to get this attention I recommend a line item of \$25,000 to be included in the Guide license budget, which is part of the Licensing Department total budget.

Sen. Ferguson will do →

Sincerely,

*Mark Jensen*

Marcus F. Jensen, Chairman  
Guide Licensing & Control Board

cc: Sen. Frank Ferguson

Jack - since it appears that the Guide Board indeed is going ahead with the regulations, we probably don't need to put it in statute - even though the attorney says the statute isn't broad enough - they can get away with it unless they're taken to court. With the problems of AB 179, this seems a better course.

ALASKA  
STATE LEGISLATURE  
MEMORANDUM

can legally do it by regulation  
Denny Kelso +

special guide licenses

meeting came up regulations - don't need  
statutory changes - took out of bill

marine mammals is the only special license -  
others are in statute either

to carry out provisions of MMPA -  
some stipulation in state

EW proposal was close to HB 199

state has to give licenses

trad subs users -  
have to keep  
purity regarding

special guide defined  
defined in statute  
special guide license already

A

March 1, 1982

Mr. Marcus Jensen, Chairman  
Guide Licensing and Control Board  
P.O. Box 2220  
Juneau, Alaska 99803

Dear Marc:

This letter is to reiterate our understanding that the Guide Board will adopt regulations providing for marine mammal guiding permits, as you and I have discussed on several occasions. You will recall that these provisions originally were to be included in HB 199, but were removed as it was felt that the matter could and would be taken care of through appropriate regulations.

Both Senator Ferguson and I are quite interested in this matter and would like to see these regulations adopted at the earliest opportunity.

I would hope that it is your intention to bring up the proposed regulations at the spring meeting of the Guide Board and move for adoption at that time. Please let me know by letter as soon as possible what the Board's plans are so that I may inform interested persons in my district. I have included for your information a copy of the language submitted by the Eskimo Walrus Commission.

Sincerely,

Rep. Jack Fuller

cc Sen. Frank Ferguson  
Matthew Iya, Kawerak

199 - fiscal note - 21 - hd. member go out + hold  
classes to prepare group for special  
marine mammal guiding licenses

3806

fish & game budget  
energy hearing 3/15  
capital & operating budgets  
to do file  
Legislature's budget

Guide Hensler 279-2511

am to Marine Mammal Act

for ab to regain mgmt, local

people shall derive any benefits  
modify guiding regs.

Guide #1 - put out RFP - <sup>contract for reviewing</sup> guide <sup>guides</sup> ~~cruse~~

seminar for these groups - asked

RURACCAP to help Kawakok put proposal  
together

letter from Harry Traeger, director 465-2534

by March 5 Div. Lic. Licensing

got letter Feb. 25. short time

Multis.

\$ from Gov. for this project 609.7 7.3 18,000  
letter of interest would suffice for now

hang-up in DC? what's the dispute

H B

210



COMMITTEE REPORT

HOUSE

3/22  
Rules

FURTHER:

Date:

Apr. 22, 1982

(7)

2/26/82

Mr. Speaker:

The Committee on JUDICIARY has had HB 210

"An Act relating to child custody."

under consideration and ~~(a majority of the committee)~~ ~~(the committee)~~ reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

replace with CS for HB 210 (HESS)  same title  
[ ] new title  
and recommends \_\_\_\_\_

[ ] AND attaches a "Letter of Intent" [g] ~~New Fiscal Note~~

reports it back <sup>as follows,</sup> without recommendation zero (attached to Bill)

[ ] referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING

DO PASS

[Signature]

[Signature] ch

MEMBERS HAVING

OTHER RECOMMENDATIONS:

[Signature] No Rec.

[Signature] No Rec.

[Signature] No Rec.

[Signature]  
CHAIRMAN

COMMITTEE REPORT

2/26

HOUSE

FURTHER: JUDICIARY

2/23/81

(5)

Date: \_\_\_\_\_

Mr. Speaker:

The Committee on HEALTH, EDUCATION & SOCIAL SERVICES has had HB 210

"An Act relating to child custody."

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

do pass  do not pass

do pass with attached amendments(s)

replace with CS for HB 210 (Kess)  same title  new title

and recommends \_\_\_\_\_

AND attaches a "Letter of Intent"  New Fiscal Note

reports it back *as follows.* ~~without recommendation~~

referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

Terry Masten  
\_\_\_\_\_  
Mike Beine  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

D Smith No Rec  
J Malone - Do Pass  
with amendments  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Mike Beine  
CHAIRMAN

Original sponsors: Rogers and Gardiner

Offered: 2/26/82  
Referred: Judiciary

1 IN THE HOUSE

BY THE HEALTH, EDUCATION AND  
SOCIAL SERVICES COMMITTEE

2 CS FOR HOUSE BILL NO. 210 (HESS)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to child custody."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 \* Section 1. LEGISLATIVE INTENT. (a) The legislature finds that it is  
9 generally desirable to assure a minor child frequent and continuing contact  
10 with both parents after the parents have separated or dissolved their mar-  
11 riage and that it is in the public interest to encourage parents to share the  
12 rights and responsibilities of child rearing. While actual physical custody  
13 may not be practical or appropriate in all cases, it is the intent of the  
14 legislature that both parents have the opportunity to guide and nurture their  
15 child and to meet the needs of the child on an equal footing beyond the  
16 considerations of support or actual custody.

17 (b) The legislature also finds that it is in the best interests of a  
18 child to encourage parents to implement their own child care agreements  
19 outside of the court setting.

20 \* Sec. 2. AS 09.55.205 is amended to read:

21 Sec. 09.55.205. JUDGMENTS FOR CUSTODY. (a) In an action for  
22 divorce or for legal separation the court may, if it has jurisdiction  
23 under AS 25.30.020 [,] and is an appropriate forum under AS 25.30.050  
24 and 25.30.060, during the pendency of the action, [OR] at the final  
25 hearing, and [OR] at any time thereafter during the minority of a [ANY]  
26 child of the marriage, make an order for the custody of or visitation  
27 with the minor child that [WHICH] may seem necessary or proper and may  
28 at any time modify or vacate the order.

29 (b) If [ANY APPOINTMENT OF] a guardian ad litem for a child is

1 appointed in an action under this section, the appointment shall be made  
2 under [THE TERMS OF] AS 09.65.130.

3 (c) The court shall determine custody in accordance with the best  
4 interests of the child under AS 25.20.060 - 25.20.150 [NEITHER PARENT  
5 IS ENTITLED TO PREFERENCE AS A MATTER OF RIGHT IN AWARDING CUSTODY OF  
6 THE CHILD]. In determining the best interests of the child the court  
7 shall consider [ALL RELEVANT FACTORS INCLUDING:]

8 (1) the physical, emotional, mental, religious, and social  
9 needs of the child;

10 (2) the capability and desire of each parent to meet these  
11 needs;

12 (3) the child's preference if the child is of sufficient age  
13 and capacity to form a preference;

14 (4) the love and affection existing between the child and  
15 each parent;

16 (5) the length of time the child has lived in a stable, sat-  
17 isfactory environment and the desirability of maintaining continuity;

18 (6) the desire and ability of each parent to allow an open  
19 and loving frequent relationship between the child and his other parent;

20 (7) the desirability of offering the child a variety of life  
21 experiences.

22 (d) In awarding custody the court may not consider the conduct,  
23 marital status, income, social or cultural environment, or life style of  
24 either parent unless it is shown that the factor relates to the well-  
25 being of the child.

26 \* Sec. 3. AS 25.20.060 is amended to read:

27 Sec. 25.20.060. CUSTODY OF THE CHILD. (a) If there is a dispute  
28 over child custody, either parent may petition the superior court for  
29 resolution of the matter under AS 25.20.060 - 25.20.150, THIS SECTION

1 UNLESS AN ACTION BETWEEN THE PARENTS IS PENDING UNDER AS 09.55]. The  
2 court shall award custody on the basis of the best interests of the  
3 child. In determining the best interests of the child, the court shall  
4 consider all relevant factors including those factors enumerated in  
5 AS 09.55.205(c) [AS 09.55.205].

6 (b) Neither parent, regardless of the question of the child's  
7 legitimacy, is entitled to preference in the awarding of custody.

8 (c) The court may award shared custody if shared custody is  
9 determined by the court to be in the best interests of the child.

10 \* Sec. 4. AS 25.20 is amended by adding new sections to read:

11 Sec. 25.20.070. TEMPORARY CUSTODY. Unless it is shown to be  
12 detrimental to the welfare of the child, the child shall have, to the  
13 greatest degree practical, equal access to both parents during the time  
14 that the court considers an award of custody under AS 25.20.060 -  
15 25.20.150.

16 Sec. 25.20.080. MEDIATION. The court considering a request for  
17 custody of a child may order the parties to participate in pre-trial  
18 mediation of the matters before the court under AS 09.55.115. *Such mediation*  
19 *shall be at the expense of ~~the~~ either or both parties, as ordered by the court.*  
20 Sec. 25.20.090. FACTORS FOR CONSIDERATION IN AWARING SHARED

21 CUSTODY. In determining whether to award shared custody of a child the  
22 court shall consider

23 (1) the child's preference if the child is of sufficient age  
24 and capacity to form a preference;

25 (2) the needs of the child;

26 (3) the stability of the home environment likely to be  
27 offered by each parent;

28 (4) the education of the child;

29 (5) the advantages of keeping the child in the community where  
the child presently resides;

1 (6) the advantages of providing a varied life experience for  
2 the child;

3 (7) the optimal time for the child to spend with each parent  
4 considering

5 (A) the actual time spent with each parent;

6 (B) the proximity of each parent to the other and to the  
7 school in which the child is enrolled;

8 (C) the feasibility of travel between the parents;

9 (D) special needs unique to the child that may be better  
10 met by one parent than the other;

11 (E) which parent is more likely to encourage frequent  
12 and continuing contact with the other parent;

13 (8) the findings and recommendations of a neutral mediator if  
14 mediation is ordered by the court;

15 (9) other factors the court considers pertinent.

16 Sec. 25.20.100. DENIAL OF SHARED CUSTODY. If a parent or the  
17 guardian ad litem requests shared custody of a child and the court  
18 denies the request, the reasons for the denial shall be stated on the  
19 record.

20 Sec. 25.20.110. AWARD OF CUSTODY TO NONPARENT. The court may  
21 award custody to a person who is not a parent of a child if

22 (1) the parents of the child consent in writing to the award;  
23 or

24 (2) the court makes a written finding that an award of custody  
25 to a parent would be detrimental to the child and the award to the  
26 person who is not a parent of the child is necessary to serve the best  
27 interests of the child.

28 Sec. 25.20.120. MODIFICATION OF CUSTODY OR VISITATION. An award  
29 of custody of a child or visitation with the child may be modified if

1 the court determines that the best interests of the child require the  
2 modification of the award. If a parent opposes the modification of the  
3 award of custody or visitation with the child and the modification is  
4 granted, the court shall enter on the record its reason for the modifi-  
5 cation.

6 Sec. 25.20.130. CONFIDENTIALITY. At any stage of a proceeding  
7 involving custody of a child the court may, if it is in the best inter-  
8 ests of the child or to protect the parents, close the proceeding to the  
9 public or order the court records closed to the public temporarily or  
10 permanently. The court may modify or vacate an order under this section  
11 at any time.

12 Sec. 25.20.140. ACCESS TO RECORDS OF THE CHILD. A parent who is  
13 not granted custody under AS 25.20.060 - 25.20.150 may have access to  
14 the medical, dental, school, and other records of the child notwith-  
15 standing any other provision of law.

16 Sec. 25.20.150. DEFINITION. In AS 25.20.060 - 25.20.150, "shared  
17 custody" means an award of custody of the child to both parents that  
18 assures the child of frequent and continuing contact with each parent.  
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29

MEMORANDUM

TO: Billy Berrier, Director  
Division of Legal Services

FROM: Rep. Jack Fuller, Chairman  
House Rules Committee

D. : March 30, 1982

Please have prepared a Rules CS for CSHB 210(HESS) which incorporates the changes recommended by the Alaska Bar Association in the attached letter. I have also attached a copy of the HESS CS with the proposed changes inked in, which you will want to check for accuracy.

Thank you.

MEMORANDUM

TO: Billy Berrier, Director  
Division of Legal Services

FROM: Rep. Jack Fuller, Chairman  
House Rules Committee

DATE: April 2, 1982

ATTENTION: Tam Cook

I need to make one change in the Rules CS which you have prepared for CSHB 210 (HESS). On page 3, line 18, add the following sentence:

Such mediation shall be at the expense of either or both parties, as ordered by the court.

Without the above language, the Court System would incur increased expenses due to court-ordered mediation.

If you have any questions, please call my aide, Linda Wild.

Thank you.

PRIME SPONSOR: ROGERS.  
CO-SPONSORS: GARDINER.  
CURRENT STATUS: 3/22/82 IN (H) RULES

HB 210 HOUSE ACTION  
DATE SEQ PAGE

LEGISLATIVE ACTION

DATE	SEQ	PAGE	LEGISLATIVE ACTION
02/23/81	01	0340	FIRST READING -- COMMITTEE REPORTS
02/26/82	02	0606	HESS -- CS02, NR01, OTHER01
02/26/82	03	0606	HESS CMTE LETTER OF INTENT
03/22/82	04	0886	JUD -- CS02, NR03
03/22/82	05	0886	F/NOTES EQUAL ZERO RULES RULES

\*\*\*\* \*\* \*\* \*\*\* \*\* \*

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST  
 Bill/Resolution No. Committee Substitute for House Bill 210  
 Title An Act relating to Child Custody  
 Requested by House Judiciary Committee Date 3/19/82

II. FISCAL DETAIL  
 Agency Affected Alaska Court System  
 Program Category Affected Administration of Justice  
 BRU, Program, Or Subprogram(s) Affected Trial Courts  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
<b>TOTAL</b>		0	0	0	0	0

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

See attached.

IV. DATE 4/1/82

PREPARED BY Richard P. Bartler  
 AGENCY Alaska Court System  
 PHONE 264-0545

Original: Legislative Finance  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)  
 33-001 (Rev. 12/8)

*Book*

Original sponsors: Rogers and Cardiner

Offered: 2/26/82  
Referred: Judiciary

BY THE HEALTH, EDUCATION AND  
SOCIAL SERVICES COMMITTEE

1 IN THE HOUSE

2 CS FOR HOUSE BILL NO. 210 (HESS)  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to child custody."

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10 with both parents after the parents have separated or dissolved their mar-  
11 riage and that it is in the public interest to encourage parents to share the  
12 rights and responsibilities of child rearing. While actual physical custody  
13 may not be practical or appropriate in all cases, it is the intent of the  
14 legislature that both parents have the opportunity to guide and nurture their  
15 child and to meet the needs of the child on an equal footing beyond the  
16 considerations of support or actual custody.

17 (b) The legislature also finds that it is in the best interests of a  
18 child to encourage parents to implement their own child care agreements  
19 outside of the court setting.

20 \* Sec. 2. AS 09.55.205 is amended to read:

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22 divorce or for legal separation <sup>or for placement of a child when one or both parents</sup> the court may, if it has jurisdiction  
23 <sup>have died,</sup> under AS 25.30.020 [,] and is an appropriate forum under AS 25.30.050  
24 and 25.30.060, during the pendency of the action, [OR] at the final  
25 hearing, and [OR] at any time thereafter during the minority of a [ANY]  
26 child of the marriage, make <sup>modify or vacate</sup> an order for the custody of or visitation  
27 <sup>including an order</sup> with the minor child that [WHICH] may seem necessary or proper and may  
28 <sup>that provides for visitation by a grandparent or other person if that is in the best interests of the child.</sup> at any time modify or vacate the order.]

29 (b) If [ANY APPOINTMENT OF] a guardian ad litem for a child is

COMMITTEE COPY

1 appointed in an action under this section, the appointment shall be made  
2 under [THE TERMS OF] AS 09.65.130(c).

3 (c) The court shall determine custody in accordance with the best  
4 interests of the child under AS 25.20.060 - 25.20.150 [NEITHER PARENT  
5 IS ENTITLED TO PREFERENCE AS A MATTER OF RIGHT IN AWARDING CUSTODY OF  
6 THE CHILD]. In determining the best interests of the child the court  
7 shall consider [ALL RELEVANT FACTORS INCLUDING:]

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9 needs of the child;

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11 needs;

12 (3) the child's preference if the child is of sufficient age  
13 and capacity to form a preference;

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15 each parent,

16 (5) the length of time the child has lived in a stable, sat-  
17 isfactory environment and the desirability of maintaining continuity;

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19 and loving frequent relationship between the child and his other parent;

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21 experiences.

22 (d) In awarding custody the court may not consider the conduct,  
23 marital status, income, social or cultural environment, or life style of  
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29 resolution of the matter under AS 25.20.060 - 25.20.150 [THIS SECTION

1 UNLESS AN ACTION BETWEEN THE PARENTS IS PENDING UNDEP AS 09.55]. The  
2 court shall award custody on the basis of the best interests of the  
3 child. In determining the best interests of the child, the court shall  
4 consider all relevant factors including those factors enumerated in  
5 AS 09.55.205(c) [AS 09.55.205].

6 (b) Neither parent, regardless of the question of the child's  
7 legitimacy, is entitled to preference in the awarding of custody.

8 (c) The court may award shared custody if shared custody is  
9 determined by the court to be in the best interests of the child.

10 \* Sec. 4. AS 25.20 is amended by adding new sections to read:

11 Sec. 25.20.070. TEMPORARY CUSTODY. Unless it is shown to be  
12 detrimental to the welfare of the child, the child shall have, to the  
13 greatest degree practical, equal access to both parents during the time  
14 that the court considers an award of custody under AS 25.20.060 -  
15 25.20.150.

16 Sec. 25.20.080. MEDIATION. The court considering a request for  
17 custody of a child may ~~order~~ *per call, do not include 3/30* order the parties to participate in pre-trial  
18 mediation of the matters before the court under AS 09.55.115.

19 Sec. 25.20.090. FACTORS FOR CONSIDERATION IN AWARDING SHARED  
20 CUSTODY. In determining whether to award shared custody of a child the  
21 court shall consider

- 22 (1) the child's preference if the child is of sufficient age  
23 and capacity to form a preference;
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- 25 (3) the stability of the home environment likely to be  
26 offered by each parent;
- 27 (4) the education of the child;
- 28 (5) the advantages of keeping the child in the community where  
29 the child presently resides;

1 (6) the advantages of providing a varied life experience for  
2 the child;

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4 considering

5 (A) the actual time spent with each parent;

6 (B) the proximity of each parent to the other and to the  
7 school in which the child is enrolled;

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11 (E) which parent is more likely to encourage frequent  
12 and continuing contact with the other parent;

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14 mediation is ordered by the court;

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26 person who is not a parent of the child is necessary to serve the best  
27 interests of the child.

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29 of custody of a child or visitation with the child may be modified if

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2 modification of the award. If a parent opposes the modification of the  
3 award of custody or visitation with the child and the modification is  
4 granted, the court shall enter on the record its reason for the modifi-  
5 cation.

6 Sec. 25.20.130. CONFIDENTIALITY. At any stage of a proceeding  
7 involving custody of a child the court may, if it is in the best inter-  
8 ests of the child or to protect the parents, close the proceeding to the  
9 public or order the court records closed to the public temporarily or  
10 permanently. The court may modify or vacate an order under this section  
11 at any time.

12 Sec. 25.20.140. ACCESS TO RECORDS OF THE CHILD. A parent who is  
13 not granted custody under AS 25.20.060 - 25.20.150 may have access to  
14 the medical, dental, school, and other records of the child notwith-  
15 standing any other provision of law.

16 Sec. 25.20.150. DEFINITION. In AS 25.20.060 - 25.20.150, "shared  
17 custody" means an award of custody of the child to both parents that  
18 assures the child of frequent and continuing contact with each parent.  
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# ALASKA BAR ASSOCIATION

P.O. BOX 279, ANCHORAGE, ALASKA 99510, (907) 272-7469

*David W. ...*

909 W. 9th Avenue, Suite 230  
Anchorage, AK 99501  
276-6844 or 6945  
March 19, 1982

## FAMILY LAW SECTION

### EXECUTIVE COMMITTEE

#### CHAIRPERSON

John E. Reese  
920 W. 6th Avenue  
Anchorage, Alaska 99501  
(907) 276-5231

#### MEMBERS

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Anchorage

Max F. Gruenberg, Jr.  
Anchorage

William D. Hitchcock  
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Anchorage

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Harold M. Brown  
Ketchikan

The Honorable Ramona Barnes  
Chairman, House Judiciary Committee  
House of Representatives  
Pouch V  
Juneau, AK 99811

Attn: Bill Cook

Re: HB 210, "An Act Relating  
to Child Custody"

Dear Madam Chairman:

As Bill Cook and I discussed Friday, March 12, the Family Law Committee of the Alaska Bar Association believes that AS 09.55.205 presently permits joint custody awards in the court's discretion. Thus HB 210 is not necessary. However, the bill does provide notice to the general public as to the criteria to be utilized in custody decisions and that, under certain conditions, joint custody may be awarded. For this reason, we favor the House HESS Committee Substitute over the original bill introduced by representatives Rogers and Gardner which provided for a legal presumption in favor of joint custody. The HESS Committee Substitute was drafted after extensive discussions and negotiations and provides, we believe, a reasonable accommodation of the various competing interests if the Legislature believes a bill is necessary on the subject.

We would only request that the House Judiciary Committee make several minor modifications to the HESS Committee Substitute as set forth below.

1. HB 532, copy enclosed, recently passed both houses and is awaiting the Governor's signature. This bill provides for visitation awards to non-parents in certain circumstances. It is most important that HB 210 be amended to reflect the changes made by HB 532. Otherwise, since HB 210 would pass later in the session than HB 532, HB 210 would be construed as repealing HB 532, a result, I am certain, the Legislature would not intend.

The Honorable Ramona Barnes  
Re: HB 210, "An Act Relating to Child Custody"  
March 19, 1982  
Page 2

Specificially AS 09.55.205 as amended by section 2 of HB 210 should be further amended to reflect HB 532.

2. AS 09.55.205(d), as added by the bill, prohibits the court from considering any of the enumerated factors unless it is shown that the factor "relates to" the wellbeing of the child. See page 22 line 24. Recent Alaska Supreme Court cases require a closer nexus between these factors and the best interests of the child than that they merely "relate to" the child's wellbeing. See, for example, Craig v. McBride, Op. No. 2462 (Alaska January 29, 1982), which states that such factors "should be determinative only were such conduct to adversely affect the child or the mother's parenting abilities." Op. No. 2462 at 8. (emphasis added). For this reason, we suggest that the phrase "relates to" on line 24 of page 2 of the bill be changed to "affects". This will only allow the consideration of such evidence if the court finds a causal connection between the evidence and the wellbeing of the child.

Thank you very much for your consideration of these two suggested amendments to HB 210.

I am also enclosing as per my discussion with Bill a copy of an article written by Donald B. King, the San Francisco, California Domestic Relations Superior Court Judge, describing the results of mandatory mediation, which is now required by law in that state. This article appeared in the January 19, 1982 issue of the California Lawyer, the official publication of the State Bar of California. As Judge King states, after mandatory mediation, there were only five contested custody or visitation hearings or trials in San Francisco during the entire year of 1980. In one year there were fewer hearings than there had been in a single day under the old system.

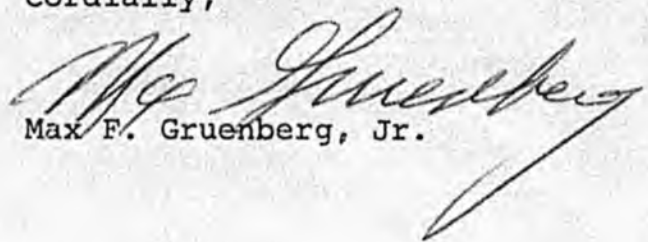
A number of us in the field of family law believe that similar dramatic changes could occur if Alaska were to establish specialized family courts with trained personnel and carefully drafted procedures, such as mandatory mediation. If you would like to discuss this matter further, please give me a collect call. We are most interested in seeing such legislation introduced because we believe it cannot help but save both the State and litigants substantial sums and,

The Honorable Ramona Barnes  
Re: HB 210, "An Act Relating to Child Custody"  
March 19, 1982  
Page 3

even more importantly, salvage many people who now become seriously embittered as the result of traumatic domestic relations litigation.

With best wishes.

Cordially,



Max F. Gruenberg, Jr.

MFG/mt  
Encls.  
cc. Jody Sutherland  
John Reese, Esq.

I. REQUEST

Bill/Resolution No. CSHB 210 (HESS)  
 Title "An act relating to child custody."  
 Requested by Repr. Barnes, House Judiciary Date March 9, 1982

II. FISCAL DETAIL

Agency Affected Department of Law  
 Program Category Affected General Government  
 BRU, Program, Or Subprogram(s) Affected Legal Services  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME	0	0	0	0	0	0
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

This bill involves child custody upon the separation of parents or the dissolution of a marriage which is a matter between private parties and it will therefore not have a fiscal impact on any of the department's activities.

IV. DATE March 9, 1982

PREPARED BY Richard I. Peques, Director, Admin. Svcs

AGENCY Department of Law

Original: Legislative Finance

PHONE 465-3672

cc: Budget and Management

Prime Sponsor (First Legislator Named)

33-001 (Rev. 12/81)

*Richard I. Peques*

HB 210

Bill/Resolution No. CS for House Bill No. 210 (HESS)  
 Title "An Act relating to child custody."  
 Requested by \_\_\_\_\_ Date \_\_\_\_\_

II. FISCAL DETAIL

Agency Affected Department of Health and Social Services  
 Program Category Affected \_\_\_\_\_  
 BRU, Program, Or Subprogram(s) Affected \_\_\_\_\_  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER (Specify Source)	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

FULL TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

CS for House Bill No. 210 (HESS) has no fiscal impact on the Department of Health and Social Services.

IV. DATE 1/28/82 PREPARED BY J.R. Pugh John R. Pugh, Director  
 AGENCY Division of Family and Youth Services  
 Original: Legislative Finance PHONE 465-4170  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)  
 33-001 (Rev. 12/81)

JCC



Official Business

# Alaska State Legislature

## House of Representatives

Committee on

Health, Education & Social Services

Pouch V  
State Capitol  
Juneau, Alaska 99811

Feb. 23, 1982

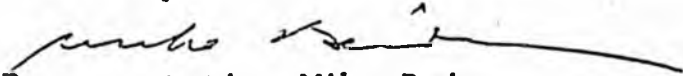
Honorable Joe Hayes  
Speaker, House of Representatives  
Alaska State Legislature

Dear Mr. Speaker:

It is the desire of the Committee on Health, Education, and Social Services that this letter accompany CS for HB 210 (HESS) to reflect Committee intent.

Persuant to Section 25.20.110, Award of Custody to Nonparent, the court shall have the discretion to award custody of the child to a non-parent if either conditions (1) or (2) are met.

Sincerely,

  
Representative Mike Beirne  
Chairman

H B

2 2 9

# employee overtime compensation HB 229

by Randolph Anderson, Burns  
Bettisworth, Fanning, Metcalf

1. Technical: ok
2. carrier \_\_\_\_\_  
votes \_\_\_\_\_  
attendance needed \_\_\_\_\_
3. fiscal note
4. who wants?
5. potential amendments: Molone vid.  
letter + newspaper article relating to bill -  
will probably be a controversial bill

COMMITTEE REPORT

HOUSE

1/25  
Pulle  
waived  
1/25/

~~2~~  
2 Waive Finance referral

FURTHER FINANCE

Date: 1/23/82

Mr. Speaker:

The Committee on STATE AFFAIRS has had HB 229

"An Act relating to employee overtime compensation; and providing for an effective date."

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass  do not pass
- do pass with attached amendments(s)
- replace with CS for HB 229 (SA)  same title  
 new title
- and recommends CS do pass
- AND attaches a "Letter of Intent"  New Fiscal Note
- reports it back without recommendation
- referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

Ray Petralle

[Signature]

Ken Finning

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

[Signature] NO REC

[Signature] No Rec

Brown

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Ray Petralle  
CHAIRMAN

COMMITTEE REPORT

HOUSE

2/9  
Rules

FURTHER:

(5)

1/29/82

Date: 2-9-1982

Mr. Speaker: (Taken from calendar 1/29/82 and returned to Rules.)

The Committee on RULES has had HB 229

"An Act relating to employee overtime compensation; and providing for an effective date."

under consideration and ~~(a majority of the committee)~~ ~~(the committee)~~ reports it back with the following recommendations:

- do pass [ ] do not pass
- [ ] do pass with attached amendments(s)
- replace with ~~CS~~ for HB 229 (SA) (Res) as amended  same title  new title
- and recommends: ~~do pass individual recommendations~~
- [ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note
- [ ] reports it back without recommendation. ~~individual recommendations~~
- [ ] referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

Joe L. Hayes

Jack Fuller

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

MEMBERS HAVING  
OTHER RECOMMENDATIONS:

Patrick D. O'Connell - No Rec

R. O. E. Pell - No Rec

A. Smith - No Rec

\_\_\_\_\_

\_\_\_\_\_

Jack Fuller

CHAIRMAN

COMMITTEE REPORT

HOUSE

1/25  
File  
waived  
1/25

2/26/81

FURTHER: FINANCE

(5)

Date: 1/25/82

Mr. Speaker:

The Committee on STATE AFFAIRS has had HB 229

"An Act relating to employee overtime compensation; and providing for an effective date."

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass [ ] do not pass Pg. 133
- do pass with attached amendments(s)
- replace with CS for HB 229 (SA) [ ] same title [X] new title
- and recommends CS de pass
- [ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note
- [ ] reports it back without recommendation
- [ ] referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING

DO PASS

Ray Petralle

[Signature]

[Signature]

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

MEMBERS HAVING

OTHER RECOMMENDATIONS:

[Signature] NO REC

[Signature] NO REC

[Signature] Brown

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Ray Petralle

CHAIRMAN

Title "An Act relating to the Alaska Wage and Hour Act, and providing for an effective date"

Contact: Dale Cheek<sup>SC</sup>  
465-4870  
Judy Knight<sup>JK</sup>  
465-2700

Sec. 1  
The Department of Labor's existing definitions of "executive" and "administrative" employees, as set out in 8 AAC 15.910(1) and 8 AAC 15.910(7) do, in part, base eligibility for exemption from the Wage and Hour Act upon a percentage of time in the employee's work week that is devoted to activities not directly or closely related to the performance of executive and administrative duties. The Department's definitions are tailored after provisions in the Federal Fair Labor Standards Act (29 CFR 541.1) which also tie eligibility for exemption to the percentage of time spent by an employee performing non-administrative or non-executive duties. The Fair Labor Standards Act provides that where state law and federal law are in conflict, the law with the stricter or higher standard applies; and because the proposed amendment to AS 23.10.055(9) would render Alaska's law less stringent than the federal law, the state law would be pre-empted. The practical effect of such an amendment would probably be that those employers who do not understand the relationship of the federal and state laws will be found in violation of the over-riding federal law.

Sec. 2  
The proposed amendment to AS 23.10.110, which extends discretion to the courts in awarding liquidated damages, would bring Alaska's law into close conformity with the Fair Labor Standards Act; and the Department has no objections to it. In fact, prior to a 1979 court decision (Alaska International Industries, Inc. v. Mussara) which ruled that liquidated damages are mandatory under existing state law, the Department had not pursued a liquidated damages award if there was a showing that the employer had acted in good faith.

~~Sec. 3~~  
We do not, however, feel that any amendment with respect to the award of liquidated damages should carry a retroactive effective date. Many of the wage and overtime claims that are pending before the courts at this time, undoubtedly, have not been reviewed solely because of the large backlog of cases before the courts; and to jeopardize an employee's entitlement to liquidated damages because the courts have not been able to provide a timely review, we feel, is arbitrary and unfair.

This bill is not in the best interest of Alaskan workers; therefore the department does not support this legislation.

FACT SHEET  
CS FOR HOUSE BILL NO. 229 (RULES)

BY REPRESENTATIVE DICK RANDOLPH

The overall purpose of this bill is to bring Alaska Wage and Hour law into agreement with federal Wage and Hour law so that the employer/employee relationship will be facilitated in circumstances where separate branch establishments of business exist, and to allow a court to waive double liquidated damages provisions in cases involving overtime pay when the court determines that the employer acted in good faith.

Section 1 This section makes Alaska law identical to federal law in allowing employees who are in sole charge of an independent business establishment to be exempt from the wage and hour act regardless of what percentage of the employees' working hours are devoted to activities not directly or closely related to the performance of executive or administrative activities. Current Alaska law makes the sole charge employee still subject to overtime compensation provisions if the employee devotes more than 20% of his work time to non-executive or administrative duties. *See DOL paper*

Since the 20% standard is difficult or impossible to establish and could subject the employer to possible double liquidated damages if the employee were to come back later and claim he spent more than 20% of his time on such activities, existing Alaska law virtually wipes out any sole charge exception. The ultimate effect is that employers instead hire managers of separate branch establishments at relatively low hourly wage rates so as to mitigate the effect of overtime provisions. This, in turn, makes managers of branch establishments unhappy because having responsibly worked their way to a manager's position they find themselves being paid at a low hourly wage rather than to have the freedom and prestige of negotiating a monthly salary or even incentive salary contract.

The "sole charge" exception is particularly important to employers and employees involved with small branch establishments such as convenience food businesses since it is more efficient for a manager to be able to act in other capacities during peak workload hours. The sole charge exception existed by regulation in Alaska until a few years ago, at which time the Department of Labor wiped it out with the 20% regulation. The changes to law under section 1 benefit both the employer and employee as well as the consuming public by allowing the most efficient business practices.

Section 2 Both current federal and state law provide for double liquidated damages if an employer violates overtime and other provisions of wage and hour law. Federal law, however, provides that if a court of law finds that an employer acted in good faith with reasonable grounds to believe his act was not a violation of the Fair Labor Standards Act then the employer only pays actual damages.

In other words, since Alaska does not allow the "good faith" exception of double damages, even if an employer was told by the Department of Labor that he was acting within the law, he would have to pay double damages if it turns out the Department of Labor was wrong.

The federal "good faith" exception is found in different sections of law from the wage and hour sections from which the Alaska wage and hour act was modeled at the time of statehood. It is likely that Alaska drafters intended to follow federal law in drafting our wage and hour law, but inadvertently neglected to include the "good faith" exception.

The "good faith" exception does not grant the employer any special advantages over the employee. It merely avoids inflexibility in damages provisions which could result in injustice by allowing a court of law to determine whether the employer acted in good or bad faith.

One advantage to the State of Alaska by passage of section 2 is that since there is the possibility of a finding of "good faith" by the court section 2 would create an element of dispute which would allow settlement of cases without going to court. Presently, the State of Alaska holds many wage and hour claims of employees in trust for them while it attempts to recover the claim from an employer. Since Alaska law requires double damages, the state can settle for nothing less even if the employee adamantly wishes to settle. In such cases, the state must tell the employee to pursue his claim on his own. With passage of section 2, the Department of Labor can now settle cases more easily with employees' consent.



# Alaska State Legislature

## House of Representatives

### Committee on Rules

Official Business

Pouch V  
State Capitol  
Juneau, Alaska 99811

#### MEMORANDUM

TO: Billy Berrier, Director  
Division of Legal Services

FROM: Rep. Jack Fuller, Chairman  
House Rules Committee

DATE: February 9, 1982

Please prepare a revised Rules CS for HB 229 with the following changes over the draft Rules CS:

Page 2: DELETE Sections 3 and 4.

Thank you.

1-25-82

HB 229

The State Affairs Committee has had HOUSE BILL NO. 229 (relating to employee overtime compensation; eff. date) under consideration and a majority of the committee recommend that it be replaced with COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 229 (SA):

"An Act relating to the Alaska Wage and Hour Act; and providing for an effective date"

134

HOUSE JOURNAL

January 25, 1982

HB 229 cont'd

and that it do pass. Concurring: Metcalfe (Chairman), Abood and Fanning. Not concurring: Miller and Brown had no recommendation.

Representative Adams moved and asked unanimous consent that the Finance referral be waived. There being no objection, it was so ordered.

HB 229 was referred to the Rules Committee for placement on the calendar.

January 29, 1982

HOUSE JOURNAL

HB 229

Representative Halford moved and asked unanimous consent that HOUSE BILL NO. 229 (relating to employee overtime compensation; eff. date) which was first on today's calendar be returned to the Rules Committee for further consideration.

Representative Rogers objected and moved and asked unanimous consent that HB 229 be referred to the Labor & Commerce Committee.

Representative Halford objected.

The Speaker stated that the motion was out of order since there was a previous motion pending before the House.

Representative Rogers withdrew his motion.

Representative Rogers moved to amend Representative Halford's motion and refer HB 229 to the Labor & Commerce Committee.

HB 229 (cont'd)

Representative Randolph objected.

The question being: "Shall the motion to amend Representative Halford's motion and refer HB 229 to the Labor & Commerce Committee pass the House?" The roll was taken with the following result:

Yeas:		Buchholdt, Clocksin, Cotten, Duncan, Gardiner, Malone, Miller, Moss, Rogers, Smith, Vaska, Zharoff
Nays:	24	Abood, Adams, Anderson, Barnes, Bettisworth, Bylsma, Carney, Cato, Chuckwak, Cuddy, Fanning, Fuller, Halford, Haugen, Hayes, Hurlbert, Martin, Heekins, Metcalfe, Montgomery, O'Connell, Phillips, Randolph, Sutcliffe
Excused:	4	Beirne, Brown, Freeman, Crussendorf.
Absent:	0	

Representative Miller was voting in Representative Brown's station.

And so, Representative Rogers' amendment to the motion failed.

Representative Rogers withdrew his objection to the original motion by Representative Halford. There being no further objection HB 229 was returned to the Rules Committee.