

SUMMARY OF CONCERNS AND RESPONSES

BACKGROUND

In the last year, the U.S. Fish and Wildlife Service (Service) sought input from stakeholders to help clarify certain terms used in the Marine Mammal Protection Act (MMPA) and the Service's implementing regulations. The Service prepared a document, entitled "Draft Clarification of Select Terms under the Marine Mammal Protection Act in Regard to Sea Otters," requesting information to help clarify three terms: "significantly altered from their natural form" (hereafter "significantly altered"), "dwells on the coast," and "large-scale mass production." It was posted on the Alaska Region's Web site and we invited public review and comment from March 1, 2013, to August 6, 2013.

The Service received over 115,000 comments on the draft language. Almost all were either form letters initiated by non-governmental organizations (NGO), or [signatures on an on-line petition](#). Approximately 100 individual comments were received that addressed specific issues with the clarification document itself, as well as other sea otter management issues in Alaska. [Comments are posted on our Web site](#).

Below, we provide a general summary of concerns expressed in the comment letters. Although there is no requirement that we provide a response to the public comments that we received because this is not a rulemaking, we are doing so as a benefit to stakeholders interested in this issue.

SUMMARY OF CONCERNS

- **Purpose of guidance was unclear**

Commenters expressed concern that the clarification of the term "significantly altered" would result in an expansion of take by Alaska Native peoples. They suggested that the guidance effort was motivated by the Service's desire to encourage use of the take exemption for Alaska Native handicrafts as a management tool to reduce sea otter populations in areas where commercial and subsistence fisheries compete with sea otters for shellfish.

Other commenters expressed concern that the draft clarification document would restrict Alaska Native peoples from exercising their rights under the MMPA exemption. These commenters expressed that the proposed interpretations were inconsistent with the language of the statute (i.e., the MMPA) as well as the overriding purpose of the Native exemption. In regard to the term "significantly altered," these commenters requested the Service use the language developed by Alaska Native hunters and handicrafters at a joint Indigenous Peoples Council on Marine Mammals (IPCoMM) and Service workshop held in October 2012, which was later endorsed by the Alaska Federation of Natives at its 2012 Annual Convention. They also recommended that the Service abandon the effort to clarify "dwells on the coast" and "large-scale mass production." They stated the clarification created more confusion, and instead recommended we work with co-

management partners and National Oceanic Atmospheric Administration (NOAA)-Fisheries to address these issues.

Response

The purpose of the guidance was to more clearly explain our interpretation of certain terms in the MMPA; it was not to make those terms more permissive or more restrictive. The draft guidance was also largely reflective of current, on-the-ground agency practices.

In response to concerns that the guidance was undertaken as a form of predator control to manage sea otter population growth or distribution, it was not. We reiterate that the purpose of the guidance is to clarify our interpretation of certain terms. The term “significantly altered” has been a source of confusion for over 20 years, and there have been substantial efforts made in the past to work with Alaska Native peoples, NOAA-Fisheries, and others to provide clarification (as described further below). While the take of sea otters by Alaska Natives is expected to overlap with some areas where there are sea otter/fishery conflicts, under the MMPA any take of sea otters by Alaska Native peoples must be for purpose of subsistence or to make handicrafts or clothing, and not as a form of predator control to protect shellfish for human consumption.

The final language largely addresses the concerns of the Alaska Native commenters because they are directly subject to the exemption and this effort was undertaken to address their concerns about clarity. In regard to the term “significantly altered,” the final guidance was changed to more closely reflect input received at the handicrafter workshop and endorsed by many Alaska Native commenters, with the addition of two phrases to ensure that the guidance is consistent with the current regulatory language and that it reflects legislative intent. In response to concerns stated by many Alaska Native commenters that our proposed explanatory language for “dwells on the coast” and “large-scale mass production” was still unclear, we will not be publishing guidance for those terms. Those terms have not generated the same amount of controversy as “significantly altered.” If further action is warranted, we believe that any confusion about the terms would be more appropriately addressed in joint guidance with NOAA-Fisheries because the terms have general application to all marine mammal species; rather than “significantly altered” which has unique attributes associated with each species.

- **Process used to seek input was faulty**

Commenters expressed concern about the process used to seek input. Some argued that the draft document should have been considered rulemaking and should have been published in the Federal Register because they believed that the draft guidance represented a substantial change from current agency practices. Some commenters felt that early input was solicited from only a few stakeholder groups, i.e., Alaska Natives, and not from other groups, i.e., environmental groups, NOAA-Fisheries. Some commenters also felt that the initial timeframe for receiving input (web posting that extended from March 1, 2013, to May 15, 2013, 71 days) was too short for adequate review and comment.

Other commenters felt that the process was much too cumbersome and lengthy. They also felt that too much weight was being placed on input from individuals and groups, such as environmental NGOs, that did not live in Alaska and were not affected by the regulations.

Response

The Service acknowledges that Alaska Native peoples have particular knowledge and expertise about sea otter hunting and the creation of handicrafts that should be used to inform agency decision-makers. The foundation of this guidance was input received from Alaska Native hunters and handicrafters at an October 2012 workshop; and the photographs in Attachment 1 were taken of articles shared by attendees to that workshop. We also acknowledge that the circle of stakeholders interested in the health and well-being of sea otter populations goes beyond Alaska Native peoples, which is why greater public input was sought.

In regard to our method of soliciting input, we believe that our level of effort was commensurate with the scope of this guidance document. The draft document was posted on March 1, 2013, and over 135 individuals, organization, tribes, agencies, or NGOs that were identified as having a potential interest in this issue were personally notified via telephone or e-mail that the document was available for comment. In addition, the 71-day comment period was extended to August 6, 2013, which allowed for a total of over five months for public review and comment. We agree that publication in the Federal Register is required for rulemaking actions, but not required or needed in this instance because our intent is to provide clarification through a guidance document. Further, we believe the media tools we used were more likely to reach the general public, especially rural Alaskans. Also, we emphasize this guidance does not change the existing regulation, but is merely a non-binding clarification of the term.

- **Focus on single species and/or single agency was too narrow**

Commenters pointed out that the terms being clarified applied to all marine mammals; as a result, they argued our guidance should not just address sea otters. Also, because the terms are used by both the Service and NOAA-Fisheries as the two federal agencies charged with implementing the MMPA, some commenters stated the guidance should be done jointly.

Response

We recognize the need for better coordination with NOAA-Fisheries on numerous MMPA-related issues. In this case, however, we are providing guidance only for application of the Alaska Native exemption to sea otters, a marine mammal under Service management authority. The reason for this approach is that the Alaska Native sea otter community asked for clarification to help resolve concerns specific to their activities, and the greatest number of questions and concerns that we receive are focused on the production and sale of handicrafts and clothing from sea otters.

The Service has worked with NOAA-Fisheries and with other groups in various forums attempting to address concerns over what constitutes a “significantly altered” authentic Native handicraft under the MMPA. For varying reasons, those efforts either were not finished or were not widely accepted by stakeholder groups. Of particular note among the efforts to clarify “significantly altered” are: draft guidance developed in 1995 that included sea otter, polar bear, and walrus; a working group convened between 2008-2012 that involved all marine mammals and included NOAA-Fisheries, the Service, Bureau of Indian Affairs, IPCoMM, and the Marine Mammal Commission, among others; a poster developed in 2009 which depicted significantly altered handicrafts for Service species; and draft written guidance developed in January 2012 for sea otters only.

We agree it is important to continue efforts to work with NOAA-Fisheries, Alaska Native peoples, NGOs, the Marine Mammal Commission, and others to strive towards a common understanding of terms and seek greater consistency, and we will continue to do so.

- **Number of otters harvested will increase / decrease under the guidance**

Commenters expressed concern that the guidance was likely to increase the take of sea otters by expanding the scope of products permitted under the handicraft exemption. These commenters also expressed concern that increasing the number of otters taken from the Southwest Alaska stock of sea otters, listed as threatened under the Endangered Species Act (ESA), could affect recovery of that stock. Commenters also felt the guidance could result in increased take of other marine mammals.

Other commenters stated that the lack of a definition for the term “significantly altered” has had a chilling effect on use of sea otters for making handicrafts, and that some Alaska Native peoples were foregoing hunting opportunities due to fear of law enforcement action. They argued that because the draft guidance created even more confusion, even more legally-permissible hunting opportunities might be missed.

Response

We have no information indicating this clarifying guidance will either increase or decrease the take of sea otters. The subsistence harvest of sea otters is monitored by the Service through a marine mammal Marking, Tagging, and Reporting Program (MTRP). The MTRP was established in 1989. Data from the MTRP indicate that sea otter harvest fluctuates from year to year. Increases as well as decreases in sea otter take have occurred since 1989. Data in the last five years indicate an increasing harvest trend in southeast Alaska, but not in southwest or southcentral Alaska. This increase suggests that if lack of guidance and fear of enforcement has had a chilling effect on legal harvest, that effect has been outweighed by other factors that might include an increase in harvest opportunity due to increasing sea otter populations in southeast Alaska. Given current information, there is no reason to anticipate patterns will shift greatly in either direction as a result of this guidance.

At the current time, the southeast and southcentral stocks of sea otters are increasing, or stable-to-increasing, respectively. Harvest data from southwest Alaska indicates that subsistence harvest is variable, but low, and is not thought to be affecting the population (see [Recovery Plan and 5-year Review](#)). However, if subsistence take does increase to a level that it is adversely affecting populations of sea otters in any of the 3 stocks, there are tools available to the Service to appropriately address this issue [[16 U.S.C. § 1371\(b\)](#)].

- **Guidance needs to factor in enforcement considerations**

Commenters stated that the guidance should consider how the significantly altered requirement would be enforced. These commenters also expressed concern about non-natives acquiring unaltered or minimally altered parts and converting them back to, or near to, their raw form. Some commenters suggested that a test of significance of alteration would be whether the item, when marketed, was worth more than the raw material from which it was made. Other commenters felt that enforcement actions should be focused on consumers who are purchasing handicrafts and repurposing them, instead of focusing on the Alaska Native handicrafters.

Response

The purpose of the guidance was to more clearly explain our interpretation of certain terms in the MMPA; it was not to make those terms more permissive or more restrictive. The guidance largely reflects current, on-the-ground, agency practices that are overseen with our current level of enforcement staff.

We agree with commenters that sale of unaltered or minimally altered parts that could be easily converted back to an unworked item are not consistent with the intent of the MMPA or our implementing regulations. Consequently, the final guidance contains the phrases “substantially changed” and “cannot be easily converted back” to an unaltered hide or piece of hide to ensure that the language is consistent with the existing regulatory language. The photographs in Attachment 1 also illustrate our intent, and reflect examples that were discussed during the IPCoMM / FWS workshop in 2012.

In regard to using a monetary value standard to determine level of significance, we believe that such a standard would represent a far-reaching change in agency practice and would require a rulemaking process to implement. And finally, we agree that if non-natives are repurposing sea otter handicrafts, this is an enforcement issue that is separate from the exemption provided to Alaska Native peoples by section 101(b) of the MMPA.

- **Guidance triggers the National Environmental Policy Act (NEPA) and ESA**

One commenter suggested that the Service should have conducted analyses of the guidance under the National Environmental Policy Act (NEPA) and section 7 of the ESA.

Response

We are providing guidance that clarifies the phrase “significantly altered” as it pertains to items made from sea otter. This guidance represents our interpretation of the MMPA and our implementing regulations, and as stated above, and it is largely reflective of current, on-the-ground, agency practices. This guidance is not a rule, but is merely a non-binding clarification of the term. As such, this guidance is not a major federal action that requires evaluation under NEPA or the ESA.