

Ronald Reagan Presidential Library

Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Scharfen, Jonathan R.: Files
Folder Title: Pelly/Packwood Amendments
Box: RAC Box 5

To see more digitized collections visit:

<https://www.reaganlibrary.gov/archives/digitized-textual-material>

To see all Ronald Reagan Presidential Library Inventories, visit:

<https://www.reaganlibrary.gov/archives/white-house-inventories>

Contact a reference archivist at: **reagan.library@nara.gov**

Citation Guidelines: <https://reaganlibrary.gov/archives/research-support/citation-guide>

National Archives Catalogue: <https://catalog.archives.gov/>

Last Updated: 12/28/2023

1

MARINE MAMMAL COMMISSION
1625 EYE STREET, N.W.
WASHINGTON, DC 20006

15 January 1986

The Honorable Anthony J. Calio
Administrator
National Oceanic and Atmospheric Administration
Department of Commerce
Washington, D.C. 20235

Dear Dr. Calio:

In recognition of the fact that many of the International Whaling Commission issues are complex, the Marine Mammal Commission felt it would be helpful to provide an overview of some of the major issues and to offer certain recommendations on ways in which to meet our collective objectives effectively. With this in mind, the Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, provides background information, comments, and recommendations on the following issues:

- the moratorium on commercial whaling;
- certification of whaling nations under the Pelly and Packwood-Magnuson Amendments;
- the future of the IWC;
- future activities of the IWC;
- special permits for scientific research;
- aboriginal/subsistence whaling and the bowhead whale issue;
- the comprehensive assessment of whale stocks;
- revision of the present management procedures;
- humane killing of whales; and
- small cetaceans.

The Moratorium on Commercial Whaling

Though the IWC failed to take effective measures to conserve whales in the first fifteen years of its existence, it began to do so in 1964. However, these early measures, invariably too little and too late, simply confirmed the IWC's unsatisfactory record in resource management, and many of those concerned put the matter before the United Nations Conference on the Human Environment in Stockholm, Sweden in 1972. There, a resolution was adopted by a vote of 53 in favor, none opposed, and three abstentions to recommend that the IWC establish a ten year moratorium on all commercial whaling. Since 1972, establishing such a moratorium

has been official U.S. policy. The reasons are that available data on whale populations are inadequate for making accurate determinations concerning their status and trends, that current management practices pose unacceptable risks to whale populations, and that actions by some member whaling countries have been undermining conservation efforts.

At the 1982 IWC meeting, a compromise was reached to achieve such a moratorium via a new paragraph in the Schedule of regulations. That paragraph, Schedule paragraph 10 e, provided that catch limits for commercial whaling would be set at zero beginning with the 1986 coastal and 1985/86 pelagic whaling seasons. It further provided that, by 1990 at the latest, the IWC would undertake a comprehensive assessment of the effects of this decision on whale stocks, consider modifications to this provision, and consider establishing other catch limits. Although most member nations agreed to abide by the moratorium provision, Japan, Norway, and the Soviet Union exercised their right under the International Convention for the Regulation of Whaling to object to this provision and thereby free their respective governments from the obligation to comply with its requirements.

Since 1982, the U.S. has sought to prevent any erosion of this moratorium provision and to encourage objecting nations to withdraw their objections. The Marine Mammal Commission believes that this position should be continued, at least until there is an opportunity to review the results of the comprehensive assessment and to consider revised management arrangements under which commercial whaling might occur. For commercial whaling to resume under authority of the IWC, there would need to be a three-quarters majority vote to revise Schedule paragraph 10 e. Before the U.S. could support such an action, the Marine Mammal Commission believes that the U.S. should be fully satisfied that: current uncertainties in assessment and other management deficiencies have been satisfactorily resolved; the whale stocks in question are sufficiently robust to sustain some level of exploitation; and available data and management procedures are adequate to insure that whaling would not reduce a whale stock below acceptable levels.

Certification of Whaling Nations Under the Pelly and Packwood-Magnuson Amendments

The International Convention for the Regulation of Whaling provides that party governments may, within 90 days of the adoption and enactment of any management provision by the IWC, file a formal objection to that provision and thereby exempt itself from any legal obligation under international law to comply with that measure. On several occasions, whaling nations have invoked this right, usually with the explanation that the measure constitutes an unwarranted and unnecessary restriction of their whaling interests. In part to strengthen U.S. efforts to encourage whaling nations to support IWC management measures,

Congress passed the Pelly Amendment to the Fishermen's Protective Act in 1971 and the Packwood-Magnuson Amendment to the Fishery Conservation and Management Act in 1979. The Pelly Amendment requires that the Secretary of Commerce notify the President if any foreign nation is conducting fishing operations, including whaling, "...in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program." The President may then direct the Secretary to reduce or prohibit the importation of fishery products into the U.S. from the offending country. The Packwood-Magnuson Amendment requires that the Secretary reduce by half the allocation of fish that may be taken from U.S. waters by any nation certified under the Pelly Amendment.

With respect to IWC regulations, U.S. policy has been to certify a nation only in the event of an actual violation of adopted IWC provisions. Thus, while the U.S. has not certified a nation for objecting to an IWC provision (e.g., an approved quota), it has certified one nation for failing to comply with adopted measures (i.e., taking whales in excess of an adopted quota). Recent actions with respect to Brazil, Japan, and the Soviet Union are illustrative. These countries objected to the quota adopted at the 1984 IWC meeting for the 1984-85 Southern Ocean minke whale season. The U.S. advised all three nations that they would be subject to certification and sanctions under the Pelly and Packwood-Magnuson Amendments if they were to whale under their respective objections and exceed their respective shares of the adopted IWC minke whale quota. Although Brazil and Japan did not exceed their share of the 1984-85 quota, the Soviet Union did. Once confirming information became available that the Soviet Union had done so and that the total 1984-85 IWC quota had thus been exceeded, the U.S. took steps to certify the U.S.S.R. under the Pelly Amendment and to reduce its U.S. fishery allocation under the Packwood-Magnuson Amendment by half. Since the time that the Soviet Union was advised that sanctions were being applied, it has requested no fish under the U.S. fish allocation process. Technically, under the Packwood-Magnuson Amendment, the small Soviet fishery allocation would be completely cut after the first year unless the Soviet Union took steps to correct their offending whaling practices.

Over the next year, application of the Pelly and Packwood-Magnuson Amendments may become appropriate in at least three instances. The first concerns Japanese whaling contrary to whaling quotas adopted by the IWC but consistent with the provisions of a bilateral understanding reached with the U.S. in December 1984. Specifically, on 11 December 1984, the Secretary of Commerce exchanged letters with Japan's Ambassador to the U.S. confirming an agreement whereby Japan would, by certain dates, withdraw its formal objections to the sperm whale quota and to the moratorium provision adopted by the IWC and whereby the Secretary of Commerce would then exercise discretionary authority under the Pelly Amendment by refraining from certifying Japan for certain specified whaling activity that might occur through April 1988.

In late 1984, the American Cetacean Society and others, contending that the Secretary did not have discretionary authority with respect to certifying Japan for whaling contrary to adopted IWC quotas, successfully sued the Secretary of Commerce in the U.S. District Court for the District of Columbia. An appeal by the Department of Justice before the U.S. Court of Appeals for the District of Columbia Circuit failed to overturn the District Court's 5 March 1985 decision. If the Supreme Court, which recently agreed to hear the Federal Government's appeal of the Circuit Court's decision, fails to overturn the lower Court's ruling, the Secretary will be required to certify Japan for violating adopted IWC quotas. This will trigger the mandatory sanctions of the Packwood-Magnuson Amendment requiring at least a 50 percent reduction in Japan's U.S. fishery allocation.

The second instance which may require certification concerns commercial whaling (other than that discussed immediately above) contrary to the adopted IWC moratorium provision. For example, were Norway to act under its objection to the moratorium provision and engage in commercial whaling during periods covered by the moratorium, the Secretary of Commerce should certify Norway as acting to diminish the effectiveness of the Whaling Convention and optional sanctions available under the two Amendments should be considered. Another instance in which certification and sanctions may be indicated stems from the Philippines' recent announcement that it would abrogate its prior acceptance of the moratorium provision by initiating whaling on Bryde's whales even though it did not file an objection to Schedule paragraph 10 e.

The third instance under which certification may be appropriate and necessary concerns the taking of whales under special permits which, under the Whaling Convention, member nations may grant their citizens for purposes of scientific research. This matter is discussed later in this letter in greater detail.

With respect to applying the Pelly and Packwood-Magnuson Amendments in these and other instances, a number of points should be recognized. First, sanctions under the Packwood-Magnuson Amendment are meaningful only for those nations, such as Japan, which receive substantial foreign fishery allocations under the Magnuson Fishery Conservation and Management Act. For Norway and the Soviet Union, which request or receive only a small or no U.S. fishery allocation, such sanctions do not constitute a compelling threat. Second, as the U.S. fishing industry expands, it will gradually receive an increasing proportion of available U.S. fish stocks that are now distributed under foreign fishery allocation agreements. Thus, the Packwood-Magnuson Amendment will probably become less and less significant as the U.S. fishing industry displaces foreign fleets in U.S. waters and the size of foreign fishery allocations diminishes. Third, sanctions available under the Packwood-Magnuson Amendment may be applied against a whaling country for reasons other than its whaling activity, in which

case, its influence with respect to whaling by that country's nationals would become moot. The potential elimination of U.S. fishery allocations to Japan due to its high seas drift gill net fishery could be a case in point.

Since enactment of the Pelly and Packwood-Magnuson Amendments, it has been U.S. policy to advise parties to the Whaling Convention of the availability and potential application of these sanctions in support of measures adopted by the IWC. The Marine Mammal Commission believes that a continuation of this policy is appropriate and that available sanctions should be applied as the U.S. deems necessary and appropriate. For example, it would be appropriate for the U.S. to advise Norway, the Soviet Union, and the Philippines that the U.S. will consider sanctions under both statutory provisions if commercial whaling is engaged in during the IWC's moratorium. Similarly, as discussed below, the U.S. should indicate to contracting governments its intent to consider the potential applicability of these two provisions to any special permits for scientific research that fail to reflect the advice on research proposals rendered by the IWC and its Scientific Committee and which unnecessarily diminish the effectiveness of the moratorium provision.

The Future of the IWC

While many new countries have joined the IWC in the past decade, the future of the IWC and its membership are uncertain for a variety of reasons. With the moratorium provision now in place, some of the newer members may no longer feel the need to remain in the IWC. In addition, some whaling nations have suggested the need to create a new organization limited to countries actively engaged in whaling and, thus, more sympathetic to their interests. Another point is that the irresponsibility of some member nations in paying their dues has caused the IWC to be in a state of financial crisis for several years, and there is no resolution of the problem in sight.

The Marine Mammal Commission believes it essential to continue an effective and viable international whale conservation program. While the International Convention for the Regulation of Whaling and the International Whaling Commission established by the Convention have not been fully satisfactory, no feasible alternative is visible. Thus, the Marine Mammal Commission believes that the U.S., in cooperation with other like-minded countries, must take all reasonable steps to insure the long-term future of the Convention and to improve the effectiveness of the Commission. Members must address the IWC's serious financial problems and the extreme polarization between those anxious to see a resumption of commercial whaling and those committed to an indefinite continuation of the current commercial whaling moratorium. The former problem threatens the ability of the Commission to function as required under the Convention and the latter could lead some whaling countries to abandon the Convention

in order to resume whaling under either less restrictive or perhaps no management control.

To provide additional understanding of the context within which future decisions affecting the long-term viability of the IWC must be made, the following provides a brief and necessarily superficial overview of political positions and concerns held by various groups within the IWC membership. The present member countries of the IWC can be loosely classified as follows:

Developed whaling countries (Iceland, Japan, Norway, and the U.S.S.R.) -- Of these countries, only Iceland has not filed an objection to the moratorium. It plans to carry out some whaling under special permits for scientific research as discussed below. The U.S.S.R. has announced its intention to cease commercial whaling beginning with the 1987/88 pelagic whaling season;

Less developed whaling countries (Brazil, Chile, Republic of Korea, Peru, the Philippines) -- Historically, these countries depended on the Japanese market for selling whale products, and many of their whaling stations are Japanese controlled. These countries now have or formerly had relatively small whaling industries. However, none of these countries presently maintain objections to the moratorium;

Conservation countries with aboriginal/subsistence whaling (Denmark and the U.S.);

Conservation countries which presently take no whales (Antigua and Barbados, Argentina, Australia, Belize, Costa Rica, Egypt, Finland, France, Federal Republic of Germany, India, Kenya, Mexico, Monaco, Netherlands, New Zealand, Oman, St. Lucia, St. Vincent and the Grenadines, the Seychelles, Sweden, Switzerland, and the United Kingdom) -- These countries generally oppose both aboriginal/subsistence and commercial whaling and, along with the U.S. and Denmark, are sometimes referred to as the "like-minded" countries;

Former whaling countries that now generally support conservation measures (Spain and South Africa);

Other non-whaling countries that have recently joined or which abstain on most issues (Ireland, Solomon Islands, and the Peoples Republic of China) -- China supports conservation in waters adjacent to its coasts; otherwise, it usually abstains.

There is also a Spanish language block (Spain, Latin American countries, and the Philippines) which would like to have Spanish as an official language of the IWC. Most Spanish block members

strongly oppose any consideration of small cetaceans, and some would also limit IWC jurisdiction within their respective Exclusive Economic Zones. Finally, it has been suggested that some of the less developed countries in the conservation block do not necessarily support conservation but rather oppose utilization of high seas resources by developed nations.

Future Activities of the IWC

With passage of the moratorium provision and the approach of its effective date, parties to the Convention recognized the need to reassess the roles and activities of the Commission and its associated Committees. Therefore, at the 1984 IWC meeting, the U.S. proposed, and the IWC agreed, that a working group be formed to consider the implications of the moratorium decision on the future operations of the Commission. The working group met twice before the 1985 IWC meeting. Its report, which outlines priority tasks to be addressed in coming years, was adopted by the Commission that year. Among the identified tasks were:

- the comprehensive assessment of whale stocks;
- the management of aboriginal/subsistence whaling;
- the revision of the management procedures instituted in 1975 to establish catch limits;
- the implementation of humane killing techniques;
- the Indian Ocean Sanctuary;
- the publication of Commission related reports and the compilation of whaling statistics;
- the review of special permits issued for purposes of scientific research; and
- the handling of infractions.

The working group report provides a useful review of priority tasks before the Commission. Therefore, additional work to define IWC responsibilities prior to the completion of the comprehensive assessment does not appear to be needed. As a related matter, however, the IWC adopted a resolution proposed last year by representatives of Brazil and the Philippines calling for the establishment of a working group to draft terms of reference for evaluating the socio-economic implications of zero catch limits on those countries which have adhered to and been affected by them. This issue is likely to be an important factor bearing on IWC determinations that will be made regarding future whaling activity. The working group is tentatively scheduled to meet on 2 June in Malmo, Sweden and the Marine Mammal Commission believes that the U.S. should participate in that meeting.

Special Permits for Scientific Research

Article VIII of the Whaling Convention provides that any party may grant special permits to its nationals to take whales for scientific research and that the whales taken may be processed and sold in accordance with that party government's directions. The IWC Schedule of regulations, however, also requires that the IWC and its Scientific Committee be provided with an opportunity to review and comment on proposed special permits and certain related information before a special permit is issued.

Several countries with whaling interests are considering granting such permits ostensibly to collect data for use in the comprehensive assessment. At the 1985 IWC meeting, Korea and Iceland put forward separate proposals for their nationals to take whales for purposes of scientific research. Although it is recognized that killing whales under these permits might provide additional data on the status of whale stocks, it is also recognized that poorly conceived scientific research proposals, which are not likely to produce data useful for the comprehensive assessment and which result in killing significant numbers of whales, could undermine the moratorium provision adopted by the IWC. In 1985, the Scientific Committee developed a series of guidelines on scientific research proposals and then considered the proposals put forward by Iceland and Korea. The IWC also agreed to establish a working group to study a proposal by Sweden to further define recommended parameters for issuing special permits for scientific research and for conducting trade in products derived from the whales taken. This working group is tentatively scheduled to meet on 2 June 1986 in Malmo, Sweden before the IWC meeting. The Marine Mammal Commission believes that the U.S. should participate in that meeting to help develop advice with respect to the issuance of scientific research permits. In this regard, the Marine Mammal Commission intends to give you detailed comments on the Icelandic whale research proposal soon.

In addition, the Marine Mammal Commission believes that the U.S. should actively participate in efforts by the Scientific Committee and the IWC to carefully review and provide advice on all research proposals requiring such permits. If a party government chooses to issue a special permit without proper notification to the IWC or if it clearly disregards the Scientific Committee's advice as provided through the IWC, the U.S. should be prepared to consider the application of sanctions under the Pelly and Packwood-Magnuson Amendments once whaling under that permit begins. For example, if, contrary to the advice of the Scientific Committee as adopted or modified by the IWC, a government issues a special permit which is not likely to result in developing substantial new information necessary for the comprehensive assessment and which would authorize a take of whales that would be contrary to the purposes of the commercial whaling moratorium,

it would be appropriate for the U.S. to consider certifying that government as acting in a manner which diminishes the effectiveness of the Whaling Convention.

Aboriginal/Subsistence Whaling and the Alaska Bowhead Whale Issue

Under the original Whaling Convention, the take of bowhead whales by Eskimos for purposes of local consumption was explicitly exempted from management provisions developed to control other whaling operations. Although the IWC paid little attention to aboriginal whaling before the 1970's, the Scientific Committee became concerned at that time about the substantially increased effort to take bowhead whales by Alaskan Eskimos. In 1977, after several years of inaction on the part of the IWC on this matter, the Scientific Committee recommended that the IWC delete from its Schedule the exemption allowing the aboriginal taking of bowhead whales for subsistence purposes. While the IWC adopted this recommendation at its Annual Meeting in 1977, it subsequently modified this action at a special meeting in December 1977 at which it was agreed to allow a limited take to meet aboriginal/subsistence needs.

During those years between 1977 and 1984 in which the bowhead whale issue has been before it, the Scientific Committee has consistently advised the IWC that, from a biological point of view, the only safe course of action is for aboriginal/subsistence bowhead whaling catch limits to be set at zero. However, the IWC, which also considers non-biological factors relating to subsistence needs of aboriginal peoples, has consistently adopted low level catch limits for bowhead whales. Support of an IWC quota to meet Alaska Eskimo subsistence needs has placed the U.S. in the awkward position of supporting IWC actions to allow a subsistence take of a severely depleted and endangered whale population while simultaneously arguing for a moratorium on the commercial take of whales from all whale stocks.

Recognizing the special circumstances surrounding aboriginal whaling issues in general, the U.S. sought to establish a distinct management scheme within the IWC to govern aboriginal whaling. In 1982, the IWC adopted a new paragraph to its Schedule of regulations, Schedule paragraph 13 a, which set forth recommended management principles and guidelines for establishing catch limits for aboriginal/subsistence whaling. Specifically, the new paragraph allows catch limits to satisfy aboriginal/subsistence needs for whale stocks that are below MSY levels provided that the affected stocks are above a certain minimum level and also provided that the catch limit will allow recovery of the stock to its MSY level. With respect to these conditions, the Scientific Committee was directed to advise the IWC on minimum stock levels below which whales should not be taken and appropriate rates of increase towards the MSY level for each stock.

The new aboriginal/subsistence whaling scheme also sought to develop a quantitative basis for determining the nutritional, subsistence, and cultural needs of aboriginal peoples. To do this for the Alaska Eskimo bowhead whale hunt, the U.S. produced extensive reports on these aspects of the needs of Alaska Eskimos for bowhead whales. To date, the Aboriginal/Subsistence Subcommittee of the IWC's Technical Committee has made little effort to respond to U.S. presentations based on the reports and it has not made a serious attempt to factor the analyses in the reports into the development of the bowhead whale quota. During its 1985 meeting, however, the IWC agreed that the Subcommittee should examine the methods of calculation used by the U.S. in its reports.

The new aboriginal/subsistence whaling scheme formally recognizes the distinction between commercial and aboriginal/subsistence whaling. It also codifies the IWC's practice of attempting to strike a balance between the subsistence, cultural, and nutritional needs of aboriginal people and the need to protect affected whale stocks. The IWC's new aboriginal/subsistence scheme took effect in 1984. At its 1985 meeting, the IWC adopted a three-year block quota for bowhead whales of 26 strikes per year for the years 1985 to 1987. Strikes not used in any one year may be used in the following year provided that no more than 32 whales are struck in any one year.

Since the IWC quota for bowhead whales extends through 1987, bowhead whale catch limits are not likely to be a major IWC issue until 1987. If, however, new information becomes available that indicates that the size of the bowhead whale population is larger than previously thought, the Alaska Eskimo Whaling Commission may seek an increase in the bowhead whale strike limit before 1987. On the other hand, if such a request is not forthcoming, major U.S. actions will involve arranging with the Alaska Eskimo Whaling Commission to manage the hunt and ensuring that necessary research projects are identified and undertaken. Arrangements to manage the bowhead hunt are subject to a cooperative agreement between the Alaska Eskimo Whaling Commission and the National Oceanic and Atmospheric Administration under which annual quotas are negotiated. The major effort this coming year will be to ensure that the IWC bowhead whale quota and related requirements (e.g., reporting and continuing to pursue efforts to reduce struck but lost levels) are met.

With respect to research needs, the Marine Mammal Commission believes it critical that the National Marine Mammal Laboratory continue to coordinate Federal, State, and private bowhead whale research programs and that it place high priority on its own bowhead whale program. To this end, the National Marine Mammal Laboratory has convened a planning meeting of involved agencies and groups each year since 1981. We believe that there continues to be a critical need for such meetings to communicate recent research results and to plan and coordinate future activities, and we urge that such a meeting be held as soon as possible in 1986.

While the Alaska Eskimo Whaling Commission and the North Slope Borough are continuing to successfully conduct bowhead whale census studies from ice camps, the National Marine Mammal Laboratory has the more difficult task of estimating the net recruitment rate for the bowhead whale population. Since extensive aerial surveys permitting photo measurement and photo identification of individuals are the most promising approach for deriving this information, it is essential that this expensive, long-term effort be adequately funded. The U.S. commitment to a substantial bowhead whale research program has been and will continue to be of critical importance in supporting the Eskimo position at IWC meetings.

The Comprehensive Assessment of Whale Stocks

As noted above, the moratorium provision adopted by the IWC in 1982 (i.e., Schedule paragraph 10 e) set catch limits for commercial whaling at zero beginning with the 1986 coastal and the 1985/86 pelagic whaling seasons. It also provides that, by 1990 at the latest, the IWC will conduct a comprehensive assessment of the effects of the cessation of commercial whaling on whale stocks and consider modification of the provision and the establishment of other catch limits. The precise nature, scope, and details of the comprehensive assessment were not identified when paragraph 10 e was adopted by the IWC and, although several IWC working group meetings have been held to discuss the assessment, there has been no substantive progress to date towards developing agreement on the specific tasks, procedures, or timetables to be followed.

Work on these points continues, however. In order to develop a proposed approach for IWC consideration that sets forth the specific tasks, procedures, and timetables to be followed for completing the comprehensive assessment by 1990, the IWC adopted a proposal put forward by its Technical Committee. It proposed that a scientific meeting be held in the spring of 1986 and that it be followed by a joint working group meeting composed of members of the IWC Technical and Scientific Committees. The scientific meeting is scheduled for 7-11 April 1986 in England and the joint working group of the Technical and Scientific Committees is to be held in Sweden on 6 June.

As noted above, the U.S. has supported the provisions of paragraph 10 e. To meet the objective of conducting a comprehensive assessment to ensure the best possible basis for making decisions on future catch limits, the U.S. should seek the most careful analyses possible of available data on the status of whale stocks. In this regard, the U.S. should participate in scheduled meetings to plan for and carry out the comprehensive assessment. To facilitate this participation and ensure continuity of U.S. representation through the comprehensive assessment, the Marine Mammal Commission recommends that a core of three or four knowledgeable scientists be promptly designated to develop positions on the various scientific issues and to

represent the U.S. at the meetings. We also believe that the designated individuals should arrange to meet with other appropriate U.S. scientists before this April's meeting in England so as to help develop U.S. positions on both scientific issues and relevant questions of procedure including the timetable for doing the comprehensive assessment. Such consultations with knowledgeable scientists should also be a part of the preparation of background scientific papers for tabling at the scheduled meetings.

Revision of the Present Management Procedures

In the early 1970's, the IWC adopted radical revisions of its procedures for managing whaling. For example, during this period, it shifted its basis for management from Blue Whale Units to catch limits by species and then to catch limits by stock. In 1975, the IWC adopted a "New Management Procedure" which established a system of classifying stocks within one of three categories (i.e., Protected, Sustained Management, and Initial Management Stocks) based on their respective sizes relative to their estimated Maximum Sustainable Yield levels. Commercial whaling was prohibited on Protected Stocks and different levels of catch were established for stocks in the remaining two categories depending on stock size, estimated MSY levels, and various other factors. Specific catch limits were to be set by the IWC after considering the advice and recommendations of its Scientific Committee.

The new management procedure has been challenged on the basis of the inadequacy of available data to confidently identify: discrete stocks of whales; their sizes; their MSY levels; and the biological models that would accurately predict population trends and effects of whaling. Prior to 1982, the U.S. pressed for the development and adoption of further revisions to the management procedures that would help take account of such uncertainties. Although various working group meetings were held between 1979 and 1982 to consider proposed revisions, no action was taken by the IWC before its 1982 meeting. Since then, the U.S. position has been that necessary interim revisions of the IWC's management procedures were taken in the form of the moratorium provision and that any efforts other than interim changes to revise management procedures should be taken as part of the process of planning and conducting the comprehensive assessment.

The planning of a workshop on the IWC's present management procedures will be considered during the April 1986 scientific meeting in England. As noted above, the U.S. should participate in that meeting. With respect to revising present management procedures, the Marine Mammal Commission believes the U.S. should take the position that efforts to revise management procedures as part of the comprehensive assessment are an appropriate and necessary undertaking in order to fairly consider modifications to Schedule paragraph 10 e and the establishment of catch limits other than zero for commercial whaling as required by that

provision. During subsequent considerations of that matter, the U.S. should make sure that any proposal to revise management procedures incorporates certain safeguards. These should ensure that management decisions do not neglect uncertainties in available data and/or population models, and they should further ensure that the risk of reducing whale populations below acceptable levels are negligible.

Humane Killing of Whales

In 1980, the IWC banned the use of the cold (non-explosive) harpoon in all commercial whaling operations, except those that take minke whales, effective in the 1982-83 pelagic and 1983 coastal whaling seasons. The measure, adopted on the grounds that explosive harpoons which speed death are more humane, was extended by the IWC in 1981 to include minke whales. Although Brazil, Iceland, Japan, Norway, and the Soviet Union formally objected to the ban, several countries noted that their action was conditional upon the development and availability of safe and effective technology to replace the cold harpoons. By 1985, Norway and Japan were in full compliance with the ban on cold harpoons. In recent years, the U.S. has supported proposals for research on killing methods that are faster and has maintained the view that any future commercial whaling should use the most humane killing techniques available. Continued support for these positions would be appropriate.

The issue of humane killing has also been raised with respect to aboriginal/subsistence whaling. In 1985, the Aboriginal/Subsistence Whaling Subcommittee received summaries of whaling methods used by aboriginal/subsistence whalers. At the 1985 IWC meeting, it was agreed that the Humane Killing Subcommittee of the Technical Committee would prepare, in association with affected whalers, a report for consideration at the 1986 IWC meeting. The U.S. position on this subject has been to note, as appropriate, that traditional weapons used by Alaska Eskimos do not constitute cold harpoons and that recent efforts, including a doubling of the explosive force of harpoons, have been undertaken to reduce both the time to death and the number of whales struck and lost. The U.S. should continue to assist Alaska Eskimos in efforts to improve the methods used to take bowhead whales.

Small Cetaceans

The Whaling Convention itself does not define the species covered by its terms. In the past, there has been extensive debate concerning its applicability to "small" cetaceans not listed on the whale nomenclature chart appended to the Convention. In 1980, the Scientific Committee recommended that the IWC implement certain management actions for several unlisted species, including white or beluga whales (Delphinapterus leucas) and narwhals (Monodon monoceros). Canada and certain other parties

vigorously opposed the action on various policy, legal, and practical grounds maintaining, among other things, that the IWC does not have competence to manage species of whales and dolphins not listed on the nomenclature chart appended to the Convention. As a compromise measure that year, the Commission adopted a resolution proposed jointly by Canada and the U.S. which: noted that the question of IWC competence over the species in question is not resolved; recommended that the Scientific Committee's Subcommittee on Small Cetaceans continue to consider and develop advice on the status of cetaceans; and invited all contracting governments to consider that advice.

Following the 1980 meeting and in response to a general request from the IWC Secretariat for legal advice on the question of competence over "small" cetaceans, a legal memorandum was prepared by the National Oceanic and Atmospheric Administration's General Counsel and circulated to IWC parties. It concluded that nothing in the Convention explicitly limits the Convention to large cetaceans and that the broad preambulatory language suggests an intent to provide comprehensive management of cetacean exploitation. The issue remains unresolved and small cetaceans continue to be considered by the Scientific Committee and the IWC according to the understanding set forth in the 1980 resolution. A second and still unresolved issue raised during the 1980 debate concerns the rights of coastal states within their respective Exclusive Economic Zones as set forth under the Law of the Sea Treaty. Since 1980, many countries, including most Latin American countries (led by Mexico) and Japan, appear to have adopted a more negative position with respect to this issue.

Since 1980, the U.S. has avoided debate on the small cetacean issue because this might prejudice its positions that the Convention provides jurisdiction over all cetaceans, that catch limits should be listed in the IWC Schedule for the direct take of small cetaceans based on advice from the Scientific Committee, that an overview of indirect take should be maintained by the IWC but that regulation of such take should be under appropriate regional fisheries organizations, and that the question of coastal states' rights should not be discussed with respect to small cetaceans since its implications also apply to the IWC's competence over large cetaceans. The Marine Mammal Commission considers these positions appropriate.

Although the Small Cetacean Subcommittee does not develop formal management recommendations for the IWC, its meetings have provided a valuable opportunity to exchange scientific information, and several scientific recommendations to limit catches have been followed by member nations (e.g., Norway for killer whales and Japan for Baird's beaked whales) as national quotas outside the IWC regulatory scheme. During the coming year, the Subcommittee is scheduled to examine pilot whale fisheries in the Faeroe Islands and elsewhere.

Conclusions

The United States has been an active and concerned participant in International Whaling Commission efforts to develop and implement an effective global conservation program. Although a milestone in that conservation program is now being realized with the onset of a moratorium on commercial whaling during this winter's pelagic whaling season and the upcoming coastal whaling season, important and difficult decisions must be made in the next few years leading up to and through the comprehensive assessment. Looking ahead to those decisions, as discussed above in greater detail, the Marine Mammal Commission recommends that:

- as a guiding principle, the U.S. take all feasible steps to insure the long-term future of the Whaling Convention and improve the effectiveness of the IWC;
- the U.S. continue its support of the moratorium provision at least until such time as the comprehensive assessment is completed and the provisions governing commercial take are re-examined;
- the U.S. make certain that post-comprehensive assessment management decisions do not neglect uncertainties in available data and/or population models which might, if disregarded, allow whale stocks to be reduced to or maintained at unacceptable levels, and that catch limits other than zero for commercial whaling be supported only if whale stocks are determined with certainty to be at a level which could sustain such exploitation;
- a group of three or four U.S. scientists be immediately designated to represent the U.S. at IWC meetings bearing on the comprehensive assessment and that this group meet with other appropriate U.S. scientists by mid March to consult on positions and develop scientific background papers on: a) procedures and timetables affecting the comprehensive assessment and b) potential revision of the IWC's present management procedures;
- the U.S. participate in IWC meetings, including those scheduled for 7-11 April in England and 6 June in Sweden, bearing on the comprehensive assessment, as well as meetings such as the one scheduled for 2 June in Sweden on socio-economic aspects of IWC whaling decisions;
- the U.S. continue to consider and, as appropriate, invoke sanctions available under the Pelly and Packwood-Magnuson Amendments against nations whose citizens a) engage in commercial whaling contrary to the moratorium provision or b) take whales under special permits for scientific research which are issued without required

16
notification to the IWC or which clearly disregard such advice as may be provided by the IWC;

- the U.S. participate in the 2 June 1985 working group meeting and any other IWC meetings to consider matters relating to the issuance of special permits for scientific research;
- the U.S. continue to support IWC actions which reflect legitimate subsistence needs of Alaskan Eskimos;
- the U.S. maintain appropriate arrangements with the Alaska Eskimo Whaling Commission to ensure that the Alaska Eskimo bowhead whale hunt is conducted in a manner consistent with adopted IWC quotas and related provisions;
- the National Marine Mammal Laboratory continue its past practice of convening annual meetings to review and coordinate bowhead whale research supported by Federal agencies, State agencies, Native organizations, and industry groups by convening such a meeting as early as possible in 1986;
- money be provided the National Marine Mammal Laboratory to sustain efforts to better determine the net recruitment rate for the Bering Sea bowhead whale population as recommended by the IWC's Scientific Committee;
- the U.S. continue its support for development and use of the most humane killing techniques available, including efforts to improve techniques for the taking of bowhead whales for subsistence purposes; and
- the U.S. continue its position concerning small cetaceans.

Representatives of the Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals have long participated on U.S. delegations to the IWC and in the meetings of the IWC's Scientific Committee. If you feel there is any way in which this collective experience might be of help to you, please let us know.

Sincerely,



John R. Twiss, Jr.
Executive Director

cc: The Honorable Edward E. Wolfe

ACTIONS UNDER THE PELLY AMENDMENT

- ° Actions of the Secretary of Commerce
 - ° The Secretary of Commerce determines whether fishing operations of foreign nationals diminish the effectiveness of an international fishery conservation program.
 - ° The Secretary uses all information relevant to the conservation program in question in making his decision.
 - ° The Secretary gives weight to the views of the IWC and its Scientific Committee as to whether the activities in question diminish the effectiveness of the IWC conservation program.
 - ° If the Secretary determines that the operations diminish the effectiveness of an international fishery conservation program, he must so certify to the President.
 - ° It has been the Secretary's practice to provide through the State Department notification to the foreign country.
 - ° The Secretary may also certify under the Packwood - Magnuson Amendment trade (and importing) activities by nationals of a third country if the taking that produced the imported products was itself the subject of certification.

- ° Actions of the President
 - ° The President determines whether to prohibit the importation into the United States of all or some of the fish products from the certified country.
 - ° The President has unlimited discretion in making his decision.
 - ° The President notifies Congress within 60 days of certification of any action taken by him. If he does not prohibit the importation of all fish products, the President informs the Congress of the reasons therefor.
 - ° The Secretary of Commerce, the Secretary of State, and others may make recommendations to the President as to whether he should prohibit the importation of some or all of the fish products.

19

PELLE AMENDMENT

CHAPTER 25—PROTECTION OF VESSELS ON THE
HIGH SEAS AND IN TERRITORIAL WATERS
OF FOREIGN COUNTRIES

§ 1978. Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs

(a) Certification to President

(1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.

(2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.

(3) In administering this subsection, the Secretary of Commerce or the Secretary of the Interior, as appropriate, shall—

(A) periodically monitor the activities of foreign nationals that may affect the international programs referred to in paragraphs (1) and (2);

(B) promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification under paragraph (1) or (2); and

(C) promptly conclude; and reach a decision with respect to; any investigation commenced under subparagraph (B).

(4) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products (if the certification is made under paragraph (1)) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.

Notification to Congress

(b) Within sixty days following certification by the Secretary of Commerce or the Secretary of the Interior, the President shall notify the Congress of any action taken by him pursuant to such certification. In the event the President fails to direct the Secretary of the Treasury to prohibit the importation of fish products or wildlife products of the offending country, or if such prohibition does not cover all fish products or wildlife products of the offending country, the President shall inform the Congress of the reasons therefor.

Importation of fish products from offending country prohibited

(c) It shall be unlawful for any person subject to the jurisdiction of the United States knowingly to bring or import into, or cause to be imported into, the United States any fish products or wildlife products prohibited by the Secretary of the Treasury pursuant to this section.

(d) Periodic review by Secretary of Commerce or Secretary of the Interior; termination of certification; notice

After making a certification to the President under subsection (a) of this section, the Secretary of Commerce or the Secretary of the Interior, as the case may be, shall periodically review the activities of the nationals of the offending country to determine if the reasons for which the certification was made no longer prevail. Upon determining that such reasons no longer prevail, the Secretary concerned shall terminate the certification and publish notice thereof, together with a statement of the facts on which such determination is based, in the Federal Register.

(e) Penalties; forfeiture; customs laws

(1) Any person violating the provisions of this section shall be fined not more than \$10,000 for the first violation, and not more than \$25,000 for each subsequent violation.

(2) All fish products and wildlife products brought or imported into the United States in violation of this section, or the monetary value thereof, may be forfeited.

(3) All provisions of law relating to the seizure, judicial forfeiture, and condemnation of a cargo for violation of the customs laws, the disposition of such cargo or the proceeds from the sale thereof, and the remission or mitigation of such forfeitures

shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as such provisions of law are applicable and not inconsistent with this section.

(f) Enforcement

(1) Enforcement of the provisions of this section prohibiting the bringing or importation of fish products and wildlife products into the United States shall be the responsibility of the Secretary of the Treasury.

(2) The judges of the United States district courts, and United States magistrates may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process as may be required for enforcement of this chapter and regulations issued thereunder.

(3) Any person authorized to carry out enforcement activities hereunder shall have the power to execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this section.

(4) Such person so authorized shall have the power—

(A) with or without a warrant or other process, to arrest any persons subject to the jurisdiction of the United States committing in his presence or view a violation of this section or the regulations issued thereunder;

(B) with or without a warrant or other process, to search any vessel or other conveyance subject to the jurisdiction of the United States, and, if as a result of such search he has reasonable cause to believe that such vessel or other conveyance or any person on board is engaging in operations in violation of this section or the regulations issued thereunder, then to arrest such person.

(5) Such person so authorized, may seize, whenever and wherever lawfully found, all fish products and wildlife products brought or imported into the United States in violation of this section or the regulations issued thereunder. Fish products and wildlife products so seized may be disposed of pursuant to the order of a court of competent jurisdiction, or, if perishable, in a manner prescribed by regulations promulgated by the Secretary of the Treasury after consultation with the Secretary of Health and Human Services.

(g) Regulations

The Secretary of the Treasury, the Secretary of Commerce, and the Secretary of the Interior are each authorized to prescribe such regulations as he determines necessary to carry out the provisions of this section.

(h) Definitions

As used in this section—

(1) The term "person" means any individual, partnership, corporation, or association.

(2) The term "United States", when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, and the United States Virgin Islands.

(3) The term "international fishery conservation program" means any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to conserve or protect the living resources of the sea.

(4) The term "fish products" means fish and marine mammals and all products thereof taken by fishing vessels of an offending country whether or not packed, processed, or otherwise prepared for export in such country or within the jurisdiction thereof.

(5) The term "international program for endangered or threatened species" means any ban, restriction, regulation, or other measure in effect pursuant to a multilateral agreement which is in force with respect to the United States, the purpose of which is to protect endangered or threatened species of animals.

(6) The term "wildlife products" means fish (other than those to which paragraph (4) applies) and wild animals, and parts (including eggs) thereof, taken within an offending country and all products of any such fish and wild animals, or parts thereof, whether or not such products are packed, processed, or otherwise prepared for export in such country or within the jurisdiction

thereof. Such term does not include any wild animal or fish if brought or imported into the United States for scientific research.

(7) The term "taking" means—

(A) for purposes of subsection (a) (2) of this section—

(i) to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or

(ii) to attempt to engage in any such conduct with respect to, animals to which an international program for endangered or threatened species applies; and

(B) for purposes of paragraph (6), any conduct described in subparagraph (A) (i), whether or not such conduct is legal under the laws of the offending country, undertaken with respect to any wild animal.

(As amended Aug. 15, 1979, Pub.L. 96-61, § 8(b), 93 Stat. 408.)

1979 Amendment. Subsec. (a). Pub.L. 96-61, § 3(b) (1), added par. (3) and redesignated former par. (3) as (4).

Subsec. (d). Pub.L. 96-61, § 3(b) (3), added subsec. (d). Former subsec. (d) redesignated (e).

Subsecs. (e) to (h). Pub.L. 96-61, § 3(b) (2), redesignated subsecs. (d) through (g) as (e) through (h), respectively.

Change of Name. The Department of Health, Education, and Welfare was redesignated the Department of Health and Human Services, and the Secretary of Health, Education, and Welfare or any other official of the Department of Health, Education, and Welfare was redesignated the Secretary or official, as appropriate, of Health and Human Services, with any reference to the Department of Health, Education, and Welfare, the Secretary of Health, Education, and Welfare, or any official of the Department of Health, Education, and Welfare, in any law, rule, regulation, certificate, directive, instruction, or other official paper in force on the effective date of Pub.L. 96-88, as prescribed by section 601 of Pub.L. 96-88, Title VI, Oct. 17, 1979, 93 Stat. 696, set out as a note under section 3401 of Title 20, Education, deemed to refer and apply to the Department and Health and Human Services or the Secretary of Health and Human Services,

respectively, except to the extent such reference is to a function or office transferred to the Secretary of Education or the Department of Education under Pub.L. 96-88, Title III, §§ 301-307, Oct. 17, 1979, 93 Stat. 677-681. See section 3441 to 3447 and 3508 of Title 20.

Code of Federal Regulations

Foreign fishing, see 50 CFR 611.1.

Notes of Decisions

Certification to President 1

1. Certification to President

Decision of Secretary of Commerce to secure certainty of Japan's future compliance with International Convention for Regulation of Whaling program per executive agreement, rather than rely on possibility that certification of whaling practices as diminishing effectiveness of Convention and imposition of economic sanctions would produce same or better results, was reasonable construction of Pelly and Packwood Amendments. *Japan Whaling Ass'n v. American Cetacean Soc.*, Dist. Col. 1986, 106 S.Ct. 2860.

TO: Nick Loston
FTH
Lester

To: Tuck

22

Decisions on Certification
Flexibility and Consultations

The Pelly Amendment to the Fishermen's Protective Act requires that the Secretary of Commerce shall certify if the nationals of a foreign country are "conducting fishing operations which diminish the effectiveness of an international fishery conservation program." The Packwood Amendment to the Fishery Conservation and Management Act provides that the Secretary of Commerce shall certify if the nationals of a foreign country are conducting whaling operations in a manner that "diminishes the effectiveness" of the IWC.

In a 1985 case which went to the Supreme Court, a coalition of environmental organizations argued that these two Acts gave the Secretary of Commerce no discretion in certifying a nation when its nationals exceeded by any amount an IWC quota. The Supreme Court did not uphold that position. It is clear that the Court's verdict supported the discretionary powers of the Secretary of Commerce.

In defending the decision not to certify there were two main lines of argument used by State and Commerce which are relevant to Iceland's case. The first was that a bilateral agreement between the US and Japan would lead to a binding commitment by Toyko to end commercial whaling and comply with the IWC moratorium. In exchange for that commitment, Japan was able to conduct (reduced) commercial whaling operations for two years. "The Secretary of Commerce determined that this diplomatic compromise ultimately advances the goals of whale conservation." We also argued that "Our whale conservation efforts require the type of international diplomacy applied in this case. The Executive Branch must be able to apply its special knowledge of foreign relations, conservation dynamics and treaty requirements to assure the maximum effectiveness of the IWC. A strict, inflexible rule of automatic certification is likely to increase disharmony among nations and impede conservation efforts."

The second major line of argument was that Pelly and Packwood do not direct the Secretary of Commerce to consider any specific factors in reaching his conclusion nor do they require the Secretary to reach a particular conclusion in any specific case. Nowhere in the legislative history of these two Acts is there an express statement that the Secretary must certify every nation that departs from international conservation quotas. Instead, the legislative history simply reflects the undisputed understanding that Pelly/Packwood will be frequently applied in response to such departures.

23

The Secretary of Commerce, not the IWC, has statutory responsibility for determining whether a particular whaling activity has diminished the effectiveness of the IWC. The law leaves the determination to the informed discretion of the Executive Branch officer with special responsibilities for whaling issues. The language of the Acts conveys an express grant of discretion to determine each case on its merits. There is no "automatic, mandatory or non-discretionary" obligation to conclude that a deviation (from IWC quotas) has diminished the effectiveness of the IWC. The legislative history of both acts is clear -- the Secretary of Commerce is expected to exercise his discretion when deciding on certification.

Representative Pelly himself clearly indicated that not every instance would merit certification, only flagrant violations would. "While this legislation was initially prompted by the Atlantic salmon crisis, the whaling issue, and impending over-exploitation of other living marine resources, prompted me to suggest to the committee that this legislation be expanded to give the President the authority to embargo fishery products in the case of flagrant violation...."

Finally, when President Carter signed the Packwood Amendment into law, he stated, "With regard to the Packwood and Pelly Amendments, the Secretaries of Commerce and Interior should work with the Secretary of State to take prompt action to ensure that all avenues of negotiation are fully exhausted before certification is made against any foreign nation."

Draft: EUR/NE Howard Perlow (0987t)

Approve: EUR/NE JWhitlock

Clear: EUR/NE RJohnson