requirements of Section 3 of Executive Order 12291.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this final rule will not have a significant economic impact on a substantial number of small entities. This action only approves state actions. It imposes no new requirements.

List of Subjects in 40 CFR Part 62

Air pollution control, Fluoride, Sulfur, Administrative practice and procedure, Intergovernmental relations, Reporting and recordkeeping requirements.

(Sec. 111(d) of the Clean Air Act, as amended)

Dated: April 30, 1982.

Anne M. Gorsuch,

Administrator.

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

Part 62 of Chapter 1, Title 40 of the Code of Federal Regulations is amended as follows:

1. Part 62 is amended by adding a new Subpart E to read as follows:

Subpart E—Arkansas

Plan for the Control of Designated Pollutants From Existing Facilities [§ 111(d) Plan]

Authority: Sec. 111(d), Clean Air Act, as amended, 42 U.S.C. 7413 and 7601.

Subpart E—Arkansas

Plan for the Control of Designated Pollutants From Existing Facilities [§ 111(d) Plan]

§ 62.850 Identification of plan.

(a) Identification of plan: Arkansas Plan for the Control of Designated Pollutants from Existing Plants [Section 111(d) Plan].

(b) The plan was officially submitted as follows:

(1) Control of sulfuric acid mist from sulfuric acid plants, and fluoride emissions from phosphate fertilizer plants, submitted on July 11, 1979, having been adopted by the State on May 25, 1979, and letter dated August 6, 1981.

(c) Designated facilities: The plan applies to existing facilities in the following categories of sources:

(1) Sulfuric Acid Plants.

(2) Phosphate Fertilizer Plants.

§ 62.852 Emission inventories, source surveillance, reports.

(a) For purposes of this subpart, the terms "the applicable plan" and "the plan" in 40 CFR 52.178(b), which provides for public availability of emission data, include this plan.

Fluoride Emissions From Existing Phosphate Fertilizer Plants

§ 62.854 Identification of sources.

The plan applies to existing facilities at the following existing phosphate fertilizer plant:

(1) Allied Chemical Company at Helena, Arkansas.

Sulfuric Acid Mist Emissions From Existing Sulfuric Acid Plants

§ 62.855 Identification of sources.

(a) The plan applies to existing facilities at the following existing sulfuric acid plants:

(1) Olin Corporation in North Little Rock, Arkansas.

(2) The Monsanto Company in Eldorado, Arkansas.

§§ 62.856–62.869 [Reserved]

Subpart T—Louisiana

§ 62.4620 [Redesignated as § 62.4624]

2. In Subpart T—Louisiana, § 62.4620(c) in its entirety is redesignated as § 62.4624 and entitled "Identification of sources."

3. In Subpart T—Louisiana, the center heading that appears above § 62.4620 are revised to read as follows:

Plan for Control of Designated Pollutants From Existing Facilities [§ 111(d) Plan]

§ 62.4620 Identification of plan.

(a) Identification of plan: Louisiana Plan for Control of Designated Pollutants from Existing Facilities [111(d) Plan].

(b) The plan was officially submitted as follows:

(1) Control of sulfuric acid mist from sulfuric acid plants, and fluoride emissions from existing facilities at phosphate fertilizer plants, submitted on July 18, 1978, having been adopted by the State November 30, 1977, and letter dated February 16, 1982.

(c) Designated facilities: The plan applies to existing facilities in the following categories of sources:

(1) Sulfuric Acid Plants.

(2) Phosphate Fertilizer Plants.

4. In Subpart T—Louisiana, a new center heading is added above § 62.4624 and new §§ 62.4625 and 62.4626 are added to read as follows:

Sulfuric Acid Mist From Existing Sulfuric Acid Plants

* * * * *

Fluoride Emissions From Existing Phosphate Fertilizer Plants

§ 62.4625 Identification of sources.

(a) The Plan applies to existing facilities at the following phosphate fertilizer plants:

(1) Agrico Chemical Company at Donaldsville, Louisiana.

(2) Allied Chemical Corporation at Geismar, Louisiana.

(3) Beker Industries at Taft, Louisiana.

(4) Freeport Chemical at Uncle Sam, Louisiana.

(5) Monsanto at Luling, Louisiana.

§ 62.4626 Effective date.

(a) The effective date of the portion of the plan applicable to phosphate fertilizer plants is July 12, 1982.

[FR Doc. 82-12869 Filed 5-11-82; 8:45 am]
BILLING CODE 6560-50-M

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40 CFR Part 62

[A-6-FRL-2092-8]

Approval and Promulgation of State Plan for Designated Facilities and Pollutants; Louisiana Plan for Controlling Fluoride Emissions From Primary Aluminum Plants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this notice, EPA approves the Louisiana plan for controlling fluoride emissions from existing primary aluminum plants. The plan substantially fulfills the requirements of section 111(d) of the Clean Air Act, as amended in 1977 (the Act), and regulations promulgated thereunder. This plan entitled, "The Louisiana State Implementation Plan for Fluorides From Existing Primary Aluminum Plants," includes regulations adopted as section 28 of the Louisiana Air Quality Control Regulations and when approved allows the State to control emissions from existing sources.

EFFECTIVE DATE: This approval will be effective on July 12, 1982 unless notice is received within 30 days that someone wishes to submit adverse or critical comments.

ADDRESSES: Copies of the State's submittals and incorporation by reference materials are available for inspection during normal business hours at the following locations:

The Office of the Federal Register, 1100 L Street NW., Washington, D.C., Rm. 8401

Environmental Protection Agency, Public Information Reference Unit, EPA Library, 401 M Street, SW., Washington, D.C., Rm. 2922.

FOR FURTHER INFORMATION CONTACT: Estela S. Wackerbarth, Chief, Implementation Plan Section, Air Branch, Air and Waste Management Division, Environmental Protection Agency, Region 6, 1201 Elm Street, Dallas, Texas 75270 (214) 767-1518.

SUPPLEMENTARY INFORMATION:

A. Louisiana Plan

(1) On January 12, 1981, the State of Louisiana, pursuant to Section 111(d) of the Act, submitted a plan identifying the existing primary aluminum plants and establishing standards to control fluoride emissions from those facilities. The plan was adopted by the Louisiana Environmental Control Commission on December 11, 1980, after a public hearing. The State submitted additional information in its letter of January 18, 1982. EPA has reviewed this portion of the State's plan and found that it satisfies the criteria of 40 CFR Part 60 except that it does not: (1) Provide for correlation of emission inventory data with the emission limits, (2) make provision for public availability of emission data, (3) establish an effective data and (4) provide for EPA approval of alternative test methods and procedures. In a previous approval of the Section 111(d) plan for sulfuric acid mist emissions (40 CFR 62.4622), EPA has provided for correlation of inventory data with emission limits, and for making emission data available to the public (44 FR 54053, September 18, 1979). That provision applies by its terms to the entire plan, including the portion considered here. The state did not submit compliance schedules, but, as required by 40 CFR 60.2(e) will develop and submit them after EPA approval of this plan. The State's plan refers to the EPA date of approval as the beginning of those compliance schedules. In this notice, EPA establishes as the effective date of the plan the effective date of this approval. That letter clarifying the portion of the plan applicable to phosphate fertilizer plants, already approved by EPA, provides for the State's submittal of alternative test methods and procedures to EPA for approval. The clarification applied by its terms to the portion of the plan considered here. EPA approves the plan, as supplemented, in this notice.

A detailed analysis of the State's plan is contained in EPA's evaluation report.[1]

(2) The effective date for this portion of the Louisiana plan is simultaneous with the effective date of this approval (July 12, 1982), unless notice is received within 30 days that someone wishes to submit adverse or critical comments.

B. General

The public should be advised that this action will be effective 60 days from the date of this notice. However, if notice is received within 30 days that someone wishes to submit adverse or critical comments, this action will be withdrawn and a subsequent notice published before the effective date. The subsequent notice will withdraw the final action and will begin a new rulemaking by announcing a proposal of the action and establishing a comment period.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by (60 days from this date). This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Under 5 U.S.C. 605(b), the Administrator has certified that SIP approvals do not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

List of Subjects in 40 CFR Part 62

Air pollution control, Fluoride, Sulfur, Administrative practice and procedure, Intergovernmental relations, Reporting and recordkeeping requirements.

(Sec. 111(d) of the Act, as amended)

Dated: April 30, 1982.

Anne M. Gorsuch,

Administrator.

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

Part 62 of Chapter 1, Title 40 of the Code of Federal Regulations is amended as follows:

[1] Evaluation Report of Louisiana 111(d) Plan for Control of Fluoride Emissions From Primary Aluminum Plants, January, 1982; available for public inspection at times and places noted above.

Subpart T—Louisiana

1. In Subpart T—Louisiana, § 62.4620 (b)(2) and (c)(3) are added to read as follows:

§ 62.4620 Identification of plan.

* * * * *

(b)(2) Control of fluoride emissions from existing facilities at primary aluminum plants, submitted on January 12, 1981, having been adopted by the State on December 11, 1980.

* * * * *

(c)(3) Primary Aluminum Plants.

* * * * *

2. In Subpart T—Louisiana, a new center heading and §§ 62.4627 and 62.4628 are added to read:

* * * * *

Fluoride Emissions From Existing Primary Aluminum Plants

§ 62.4627 Identification of sources.

The plan applies to existing facilities at the following primary aluminum plants:

(1) The Kaiser Plant at Chalmette, Louisiana.

(2) The CONALCO Plant at Lake Charles, Louisiana.

§ 62.4628 Effective date.

The effective date of this portion of the State's plan is July 12, 1982.

[FR Doc. 82-12870 Filed 5-11-82; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 62

[A-6-FRL-2098-5]

Approval and Promulgation of the Louisiana State Plan for a Designated Facility and Pollutant; Louisiana Plan for Controlling Total Reduced Sulfur Emissions From Kraft Pulp Mills

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This notice approves Louisiana's Plan for controlling total reduced sulfur (TRS) emissions from existing kraft pulp mills. Louisiana's plan was submitted in response to the publication of emission control guidelines by the Administrator under section 111(d) of the Clean Air Act, as amended. The plan satisfies, with clarification, EPA's requirement for adoption and submittal of a plan to control TRS.

EFFECTIVE DATE: This action will be effective on July 12, 1982 unless notice is received within 30 days that someone wishes to submit adverse or critical comments.

ADDRESS: Written comments should be addressed to Estela Wackerbarth, Chief, SIP Section, Region 6, Air Program Branch (address below). Copies of the materials submitted by Louisiana may be examined during normal business hours at the following locations:

Public Reference Unit, Library Systems Branch, Environmental Protection Agency, 401 "M" Street SW., Washington, D.C. 20460

Air Program Branch, Environmental Protection Agency, 1201 Elm Street, Dallas, Texas 75270.

FOR FURTHER INFORMATION CONTACT: Estela Wackerbarth at the EPA Region 6 address above of call (214) 767-1518 (FTS 729-1518).

SUPPLEMENTARY INFORMATION: On December 10, 1979, the Governor of Louisiana, after adequate notice and public hearing, submitted the State's plan for controlling total reduced sulfur emissions from existing kraft pulp mills. This plan was adopted by the Louisiana Air Control Commission on November 27, 1979. The State has adopted this plan to establish emission limitation for TRS from the pulp paper industry. The limitations are included in revisions to their Regulation 23.0 Control of Emissions from the Chemical Wood Pulping Industry for Control of Total Reduced Sulfur Emissions and submitted part of the overall plan.

EPA has reviewed this plan and after correspondence and discussion with the State finds it approvable. A detailed analysis of this plan is contained in EPA's evaluation report. A copy of the evaluation report is available for inspection at the above addresses.

As submitted, the plan did not adequately demonstrate that the State had the requisite authority to disclose emission data to the public upon the public's request. However, EPA approved Louisiana's original 111(d) plan at 40 CFR 62.4622(c) thereby assuring public disclosure. This provision is appropriate for use in disclosing emission data from sources covered by this TRS plan.

The Plan does not establish compliance schedules. However, the plan assures that public hearings will be held in accordance with the requirements of 40 CFR 60.24(e)(2) if a compliance schedule becomes necessary.

Since EPA views this plan as noncontroversial and routine, EPA is today approving the Louisiana plan for control of TRS from kraft pulp mills. The public should be advised that this action will be effective 60 days from the date of this **Federal Register** notice. However, if notice is received within 30 days that someone wishes to submit adverse or critical comments, this action will be withdrawn and a subsequent notice will be published before the effective date. The subsequent notice will withdraw the final action and begin a new rulemaking by announcing a proposal of the action and establishing a comment period.

Under 5 U.S.C. 605(b), the Administrator has certified that SIP approvals do not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.)

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 12, 1982. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 62

Air pollution control, Fluoride, Sulfur, Administrative practice and procedure, Intergovernmental relations, Reporting and recordkeeping requirements.

(Sec. 111(d) of the Clean Air Act, as amended, 42 U.S.C. 7411(d))

Dated: April 30, 1982.

Anne M. Gorsuch,

Administrator.

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

Part 62 of Chapter 1, Title 40 of the Code of Federal Regulations is amended as follows:

Subpart T—Louisiana

1. In Subpart T—Louisiana, § 62.4620 (b)(3) and (c)(4) are added to read as follows:

§ 62.4620 Identification of plan.

* * * * *

(b)(3) Control of total reduced sulfur from existing facilities at kraft pulp mill plants, submitted in December 1979, having been adopted November 27, 1979, and letter dated February 16, 1982.

* * * * *

(c)(4) Kraft Pulp Mills.

* * * * *

2. In Subpart T—Louisiana, a new center head and § 62.4629 and § 62.4630 are added to read:

* * * * *

Total Reduced Sulfur Emissions From Existing Kraft Pulp Mills

§ 62.4629 Identification of sources.

The plan applies to existing facilities at the following kraft pulp mill plants:

(1) Boise at DeRidder, La.
(2) Boise at Elizabeth, La.
(3) Continental at Hodge, La.
(4) Crown-Zellerbach at Bogalusa, La.
(5) Crown-Zellerbach at St. Francisville, La.
(6) Georgia-Pacific at Port Hudson, La.
(7) International Paper at Bastrop, La.
(8) Olinkraft at West Monroe, La.
(9) Pineville Kraft at Pineville, La.
(10) Western Kraft at Compte, La.

§ 62.4630 Effective date.

The effective date of the portion of the plan applicable to kraft pulp mills is July 12, 1982.

[FR Doc. 82-12871 Filed 5-11-82; 8:45 am]
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federal register

Wednesday
May 12, 1982

Part V

Department of Commerce

National Oceanic and Atmospheric Administration

Transfer of Marine Mammal Management Authority to States; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmoshpheric Administration

50 CFR Part 216

Taking and Importing of Marine Mammals; Transfer of Marine Mammal Management Authority to States

AGENCY: National Oceanic and Atmoshpheric Administration, National Marine Fisheries Service, Commerce.

ACTION: Proposed rule.

SUMMARY: The Natioal Marine Fisheries Service (NMFS) is proposing a rule to implement recent amendments to the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.* The proposed regulations establish procedures for the transfer of marine mammal management authority back to the states, the form and minimum requirements of a state application for the transfer of management authority, the relationship between Federal and state wildlife agencies both prior and subsequent to the transfer of management authority, and the revocation and return to the NMFS of management authority once transferred to the states.

DATE: Comments on this proposal must be submitted on or before July 12, 1982.

ADDRESS: Interested persons or organizations are requested to submit comments to the Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, Washington, D.C. 20235.

FOR FURTHER INFORMATION CONTACT: Mr. Richard B. Roe, Acting Director, Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, Washington, D.C. 20235, (202) 634–7461.

SUPPLEMENTARY INFORMATION: On October 9, 1981, the President approved Pub. L. 97–58 amending various provisions of the Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 *et seq.* One aspect of these amendments altered the mechanism for the return of marine mammal management to the states under section 109 of the Act, 16 U.S.C. 1379. Under the pre-existing statutory procedures, states were required to request the National Marine Fisheries Service to return management of the species. If a state sought authority to allow taking of the marine mammals under its management, the state was required to request the NMFS to waive the moratorium on the taking of the species. This request required a formal Federal hearing before an Administrative Law Judge concerning the status of the requested species, and the permissible number of animals to be taken, as well as consideration of the state's proposed laws and regulations that would govern the taking of the species. The proposed waiver of the moratorium to allow taking of the species also required compliance with the provisions of the National Environmental Policy Act. In reviewing these procedures, Congress found that the lengthy process entailed in the return of management authority to states had resulted in a situation in which the goal of the Act—effective management to maintain healthy populations of marine mammals—was being impaired.

To remedy this problem, Congress established a simplified procedure under which a state could resume management of marine mamal species. This procedure entails a three step process. First, the state must submit a request to the NMFS for return of management authority for a given species or a number of speciies of marine mammals. This request and its supporting documentation is reviewed by the NMFS to determine if the state has developed and will implement a program for the conservation of the species which meets certain requirements set forth in the Act. Second, if the NMFS finds that the state program meets this initial requirement, the state must make a determination, under procedures set by the Act, of the optimum sustainable population ("OSP") of the species and the maximum allowable take of the species which is consistent with maintaining the species at OSP. Third, these determinations must be implemented through state laws and regulations and, if the range of the species extends beyond the territorial water of the state, the state and Federal governments must agree on a process for allocating the take of the species between areas under respective state and Federal jurisdictions. Once this "cooperative allocation agreement" has been signed and implemented and the OSP and maximum allowable take determinations are final and implemented under state law, the state will have exclusive authority to manage marine mammals within the state, including its territorial waters. The only exceptions to this assumption of exclusive jurisdiction would be for takings regulated by the Federal government and takings by non-state personnel for scientific and display purposes, activities which remain under the control of the Federal government pursuant to section 109 of the Act.

The regulations proposed herein will implement the statutory procedures for return of marine mammal management authority to the states. These regulations apply to the species of marine mammals currently managed by the NMFS, under the authority of the MMPA. These species include the seals, sea lions, porpoises and whales. Other species of marine mammals, including the polar bear, sea otter, walrus, dugong, manatee and marine otter are managed by the Fish and Wildlife Service of the Department of the Interior which is proposing corresponding regulations concurrent with this proposal. Specific provisions of the NMFS proposed regulations are discussed below.

Section 216.101

Paragraph (a) of this section establishes the purpose of the regulations as explained above and defines the scope of the proposed regulations. Section 216.102 is definitional. The form and minimum requirements of a state application for transfer of management authority are set forth in §§ 216.103 and 216.104. The relationship between Federal and state wildlife agencies both prior and subsequent to the transfer of management authority is defined in §§ 216.103(h), 216.105, and 216.106. The revocation and return of management authority is governed by § 216.107. In addition, § 216.108 will list species for which management authority has been returned.

Paragraph (b) of this section excludes certain aspects of marine mammal management authority from that affected by the proposed regulations. Taking of marine mammals by Federal, state and local government officials in the course of their duties is governed by § 216.22 of this Part and, therefore, the notification requirements of that section remain in effect. Section 216.22 relates to the taking of stranded and beached marine mammals and the taking of marine mammals for the protection of public health and welfare. In addition, since the Act does not regulate disposition of marine mammals taken before its effective date, December 21, 1972, these regulations reflect that exception. (Section 216.14 of this part does impose certain notification requirements pertaining to marine mammals taken before December 21, 1972). Accordingly, a state may adopt and enforce any state law relating to any marine mammal taken before that date without requesting a return of management authority under these regulations.

Section 216.102

This section provides definitions for several terms used primarily in this subpart. These regulations, however, apply to the entire Part 216. "Optimum Sustainable Population" or "OSP" is defined in 50 CFR 216.3. Congress has specifically found that this definition accurately reflects the meaning of the term and the intent of Congress in passing the Act. H.R. Rep. No. 97-228, 97th Cong., 1st Sess., p. 16 (1981). It is important to note that OSP 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.

This section also defines "state management program." The state management program consists of the legal framework under which the state will manage marine mammals. Components of this framework which are specifically required to be submitted in the state's request for return of management authority are set forth in paragraphs (b) and (c) of § 216.103 of the proposed regulations. Paragraph (d) of § 216.103 lists additional components required only in the state of Alaska's management program.

Section 216.103

This section defines the form and minimum requirements of a state request for return of management authority. Any state requesting management authority from both the NMFS and the Fish and Wildlife Service may combine the request in a single document and send copies to both agencies. The request must contain two elements: Certain aspects of the proposed state management program and supplemental information pertaining to the state management program. The request must include the text of relevant laws, regulations, policies and other authorities of state law, and a narrative discussion of how these authorities blend to form a framework that meets the new requirements of the Act.

It is important to note that although the state management program is defined broadly by § 216.102, the request for transfer of management authority need not include all aspects of the state management program. Therefore, the state need not provide specific laws or regulations pertaining to the manner, times or amount of take, unless specifically required by § 216.103. Thus, the state need not submit as part of its request regulations pertaining to such aspects of take as bag limits, seasons, or the minimum rifles caliber that can be used in taking the species. However, the request must include, for example, a law or regulation that requires taking to be humane (see § 216.103(b)(2)(i), even though this is a restriction on the manner of taking, since it is specifically required by the Act.

If any necessary aspect of state law has yet to be enacted, proposed language or a commitment of intention to introduce legislation or adopt regulations must be submitted by the governor. The Act requires the Assistant Administrator for Fisheries to find that the State "has developed and will implement" a program for the conservation of the species before management authority can be transferred. This finding can be made for some aspects of the state management program (e.g., those required to be provided by § 216.103(b)(2)(v), (b)(3), (b)(5), (b)(6)(ii) and (d)(2)) even though only proposed language or a commitment of intention is submitted. Thus, submittal of these aspects of the state management program in pre-adoption form will not preclude review and approval of the state management program. However, the failure to enact a provision substantially as proposed can be grounds for revocation of management authority pursuant to § 216.107.

It should also be noted that if a state has been transferred management authority and that authority has been returned to, or revoked by, the Assistant Administrator for Fisheries pursuant to § 216.107 of the proposed regulations, the state may, at a later date, request the transfer of management authority by complying with § 216.103 of the proposed regulations.

Paragraph (b) of this section lists those components of the state management program which must be submitted in the request for a return of management authority. In the case of Alaska, only, paragraph (d) lists additional mandatory components relating to subsistence uses of marine mammals. These requirements are considered to be the minimum necessary to enable the Assistant Administrator for Fisheries to make the determination, required by section 109(b)(1)(A) of the Act, on whether the state program "is consistent with the purpose, policies and goals of (the) Act and with international treaty obligations."

Section 216.103(b)(1) requires the state to list the scientific and common names and estimated range of the species of marine mammals for which it seeks management authority. A state may request the transfer of management for more than one species. If this is the case, those components of the state management program that apply to more than one species do not need to be repeated for each species. Rather, the state should list the species and the components of the state management program that apply to some or all of the species. Those components of the state management program that apply to individual species should be so designated. The state should discuss which components apply generally and which apply specifically in the narrative discussion required by § 216.103(a)(2).

Paragraphs (b)(2)(i) through (b)(2)(v) and paragraph (d)(1) of this section are taken directly from section 109 of the Act and therefore require little additional explanation. A few points should, however, be noted.

First, a state to which management authority has been transferred for a given species is required to regulate the taking of that species so as to prevent its population from declining below its OSP. However, the Act provides that in the case of Alaska, subsistence taking may be allowed even if the species is below its OSP, as long as the amount of subsistence take will nevertheless permit the species to increase toward its OSP. Paragraphs (b)(2)(iii) and (d)(1) of this section reflect this distinction.

Second, in accordance with the Act, paragraph (b)(2)(iv) requires the state to prohibit, with the exceptions noted below, take for scientific and display purposes. With the exception of take for scientific and display purposes done by or on behalf of the state, management of this take is retained by the NMFS. However, Federal regulation of take for scientific and display purposes will be consistent with state management as provided by § 216.105(c) of the proposed regulations.

Third, paragraph (b)(2)(v) requires the state to regulate the incidental taking of the species in a manner consistent with the Act and any Federal regulation of incidental taking. While the state regulations need to be consistent with the Federal regulations, they need not be identical.

Paragraph (b)(3) of this section requires that the state program contain procedures for acquiring and evaluating data relating to OSP and the maximum allowable take of the species. This review need not comply with § 216.104 procedures pertaining to determining OSP and the maximum allowable take of the species. However, if the review, which should be done at least annually, discloses that OSP and maximum allowable take determinations may need to be adjusted, the state must use those procedures required by § 216.104 in making these adjustments.

Paragraph (b)(6) of this section lists certain aspects of the state management program which must be considered by the Assistant Administrator for Fisheries in making a determination as to whether the state's program is consistent with the Act.

The description of the organization of state offices involved in the administration and enforcement of the state management program need describe only the various responsibilities of these offices as they relate to marine mammal management and how these offices relate to one another. In the latter regard, an organizational chart would be helpful.

Paragraph (b)(6)(ii) relates to permits involving marine mammals. The state should describe what types of permits apply to actions involving marine mammals, the laws under which such permits are granted, and what factors guide discretion on permit applications.

The state should discuss, pursuant to paragraph (b)(6)(iii), certain aspects of judicial review such as the courts which have jurisdiction to review administrative decisions, who may challenge administrative decisions, the scope of judicial review, and the range of available remedies.

The state should discuss, pursuant to paragraph (b)(6)(iv), such aspects of administrative rulemaking as notice procedures, public comment requirements, ex parte rules and hearing requirements.

Although paragraphs (b)(6)(ii) through (b)(6)(iv) pertain to state laws on specific aspects of marine nammal management, copies of these laws do not need to be included with those provided pursuant to § 216.103(a)(1). A general description of the provisions, limitations and exceptions of these laws will be sufficient.

Paragraph 216.103(c) requires the state to submit in its request for the tranfer of management authority certain supplementary information pertaining to the state management program. This information need only be submitted in summary form. It is believed that compiling the information in this form will not unduly burden the state, yet will provide the Assistant Administrator for Fisheries a baseline from which to evaluate the subsequent administration of marine mammal management by the state.

Section 109(f)(1)(B) of the Act requires Alaska to provide economic opportunities to resident subsistence users of rural coastal village in the event non-subsistence consumptive uses of marine mammals will be allowed. Section 216.103(d)(2) of the proposed regulations require Alaska to describe the types of economic opportunities to be provided in this event. Alaska need not specify which types of economic opportunities would be available in specific cases. Instead, the state should describe the procedures to be used in deciding (a) when these opportunities will be made available, (b) the extent to which they will be made available, and (c) to whom they will be made available. Section 216.03(d) applies to the state of Alaska, only, and may be disregarded by other state applicants.

Paragraphs (e) through (h) of § 216.103 provide procedures for the Assistant Administrator's review of a request for return of management authority. The preliminary review procedures of paragraph (e) are not designed as a mechanism for piecemeal review of the state's management program. This subsection can be used either to gain guidance on an entire program before formal submission, or as a means of evaluating proposed aspects of the state management program before final enactment and submission. Furthermore, pursuant to section 109(b)(2) of the Act, 16 U.S.C. 1379(b)(2), the state may not manage marine mammals even though the Assistant Administrator for Fisheries has approved its management program, until the events listed in § 216.103(h) of these regulations have occurred. When the Assistant Administrator for Fisheries finds that the state's OSP and maximum allowable take determinations are final and implemented under state law, and a cooperative allocation agreement, if necessary, has been implemented, a notice will be published in the **Federal Register** formally transferring management authority. The state can begin management at that time.

Section 216.104

This section describes procedures which the state must provide for in its management program and employ in determining the OSP of a given species and the maximum allowable number of animals that can be taken without reducing the population below OSP. These procedures are required by section 109(c)(2) of the Act, 16 U.S.C. 1379(c)(2).

The OSP and maximum allowable take determination process is composed of three steps. First, pursuant to paragraph (c) of this section, the state must make an initial determination regarding OSP and maximum allowable take. Second, pursuant to paragraph (d), the state must provide public notice of its initial determinations. The state must make copies of its initial determinations and supporting documentation available for public inspection and must provide a reasonable time in which a request for a public hearing can be made.

The third step is finalization of the determinations. If no request for a public hearing is made within the prescribed time period, the initial determinations become final. If, on the other hand, a request for a public hearing is made, the determinations do not become final until the state has complied with the procedures of paragraphs (e) through (g) of this section.

Paragraph (e) requires public notice of the state hearing. This notice must include certain information including the State's initial determinations, the date(s), location(s) and purpose of the hearing, the name(s) of person(s) who will preside at the hearing and information on how interested persons can participate in the hearing. The state must also make available a description of the documentation and the witnesses upon which it will rely in the hearing. This information must be made available sufficiently in advance of the hearing to allow preparation by interested parties of supporting or rebuttal testimony.

Paragraph (f) describes procedures which must be employed in the hearing itself. The hearing must be transcribed verbatim. In accordance with the Act, final determinations must be based on the best available scientific information. This information must be of sufficient quantity and quality to ensure that any taking will be consistent with the maintenance of OSP. *See Committee for Humane Legislation V. Richardson,* 44 F. Sup. 297 (D.D.C. 1976), *aff'd* 540 F. 2d. 1141 (D.C. Cir. 1976). In the case of Alaska when the species is below OSP, maintenance of OSP includes the amount of subsistence take which will allow the species to increase toward OSP. In the recent amendments to the MMPA, Congress specifically overruled the decision of the U.S. District Court in *People of Togiak V. United States,* 470 F. Supp. 423 (D.D.C. 1979), which had exempted Alaska natives from state management. Amended section 101(b) now allows state management of subsistence taken by Alaska natives under Section 109. Moreover, 101(b) now restricts the Alaska native definition to those natives who reside in Alaska. Interested persons must be afforded the opportunity to participate in the hearing to the extent specified in paragraph (f)(3). Other aspects of hearing procedures are left to the discretion of the presiding officer(s) in accordance with state law.

Paragraph (g) implements the Act's procedures for review of the hearing record. The state may employ any one of three methods for reviewing the record and making the final determinations based on that record. Independent of which method is used, the final determinations must be based only on information contained in the record of the public hearing. Once the final determinations are made, the state must develop a supporting decision document. This document must contain a statement of these determinations including findings and conclusions on all material issues and the reasons and basis therefor. This decision documentation must be made available to the Assistant Administrator for Fisheries and the public.

Finally, paragraph (h) of this section prescribes the parameters for judicial review of the final OSP and maximum take determinations.

The procedures required by § 216.104 apply only to OSP and maximum allowable take determinations. However, in the case of Alaska when the species is below OSP, the Act provides that subsistance take may be allowed only to the extent that the take will nevertheless allow the species to increase toward OSP. Since the maximum extent of subsistence take is subject to and must be based upon the OSP determination, the maximum allowable extent of subsistence take must also be determined in the same process. However, the extent of subsistence take that will actually be permitted within the maximum amount need not be determined through § 216.104 procedures.

If the species is at or above OSP, the state need not employ § 216.104 procedures to determine such regulatory controls on take as bag limits and quotas within the maximum biologically allowable take. Correspondingly, changes in bag limits, quotas and other similar regulatory controls on take can be made at any time through applicable state rulemaking procedures as long as the amount of take does not exceed the maximum allowable level of take as determined throught § 216.104 procedures.

Section 216.105

This section describes federal and state responsibilities after transfer of management authority. Paragraph (a) describes the cooperative allocation agreement. In the case of a species whose range extends beyond the territorial water of the state, this agreement is actually a prerequisite to the transfer of management authority. Once implemented, it describes the jurisdictional relationship between the Federal and state government after transfer. The purpose of the agreement is to provide procedures to allocate between the Fishery Conservation Zone (FCZ) under Federal jurisdiction and lands and waters under state jurisdiction the maximum allowable take which the state has determined pursuant to § 216.104. It is anticipated that after the state has made its determination as to maximum allowable take, the NMFS will provide its judgment as to the number of animals, if any, that will be taken in the FCZ. The state will compare this number to its determination of maximum take, and, in the case of Alaska, that necessary for subsistence use. The state and the NMFS will then agree, employing the procedures required by § 216.103(b)(4), if necessary, on allocation of the species for these purposes.

Pursuant to paragraph (b) of this section, once a state has management authority returned, it can request the Assistant Administrator for Fisheries to regulate hunting and subsistence take of the species within the FCZ in a manner consistent with state regulations of such take. The Assistant Administrator for Fisheries shall adopt, after notice and comment procedures, those state regulatory provisions that are found to be consistent with the administration of section 101(a) of the Act, 16 U.S.C. 1371(a), within the FCZ. This process was established by section 109(d)(2) of the Act as a mechanism for the Federal adoption of state regulations in areas beyond state territorial waters. H.R. Rep. No. 97–228, 97th Cong., 1st Sess., p. 26 (1981).

In accordance with the terms of the Act, the NMFS remains responsible for regulating the take of marine mammals for scientific and public display purposes despite transfer of management authority to the state. Pursuant to the Act, and paragraph (C) of § 216.105 of the proposed regulations, the state is granted the opportunity to review applications for such take for consistency with the state's management of the species. Under the provisions of this subsection, the Assistant Administrator for Fisheries will notify the state upon receipt of an application to remove live animals from the wild within the state for scientific research or public display purposes. The state has 30 days in which to review the application. If the state finds that the permit would not be consistent with its management of the species and so notifies the Assistant Administrator for Fisheries, the Assistant Administrator would not issue the permit. However, the Assistant Administrator will provide to the state and the applicant an opportunity, through consultations or other appropriate mechanisms, to adjust the permit application so that it is consistent with the state's management program.

Paragraph (d) of § 216.105 encourages the state and the NMFS to cooperate, to the maximum extent practicable, in conserving the species of marine mammals. This may include cooperation in research, enforcement and other aspects of marine mammal management. It is believed that such cooperative activities can provide the optimum utilization of the resources, personnel, expertise, knowledge and experience of both state and Federal wildlife agencies.

Section 216.106

This section provides procedures for the monitoring and review of the state management program. Under section 109(e) of the the Act, 16 U.S.C. 1379(e), the Assistant Administrator for Fisheries has responsibility, after management authority has been returned to the state, to monitor the state's implementation of its program. To facilitate this review process, the state is required to submit an annual report pursuant to paragraph (b) on its management of the species, and report pursuant to paragraph (c) whenever either of the two events listed in that subsection occur.

Paragraph (b) defines the components of the annual report. Any changes in the state laws of regulations provided in the original request pursuant to § 216.103(b) and, in the case of Alaska, § 216.103(d) must be described in the annual report. The report should include a discussion of how such changes affect implementation of the management program. However, the extent of each discussion should be proportional to the importance of that change. For example, a change in rulemaking procedures § 216.103(b)(6)(iv) will require less attention than a change in laws originally provided, pursuant to § 216.103(b)(2), concerning the take of the species.

Other than paragraph (b)(1), all other categories of information are limited by qualifiers such as "pertinent" and "significant" or simply seek information in summary form. Thus, the information provided need not be exhaustive, but should be sufficiently detailed and complete to provide the Assistant Administrator for Fisheries with a fair assessment of the administration of the state management program.

Paragraph (c) of this section requires the state to report the occurrence of eigher of two specified events. These events concern either the very foundation of the state management program or the status of the species involved and, therefore, require immediate review by the Assistant Administrator for Fisheries.

The report should describe the event and how it affects marine mammal management. The extent of discussion should correspond to the magnitude of the problem for either the state management program or the species. For example, a change in regulatory procedures for acquiring and evaluating data relating to OSP (§ 216.103(b)(3)) would in most cases require less discussion than a statutory or regulatory amendment allowing take in excess of the maximum allowable take determined pursuant to § 216.104 (§ 216.103(b)(2)(iii)).

Paragraph (d) of § 216.106 provides that all components of the state management program as well as annual reports submitted pursuant to § 216.106(b) and any reports submitted pursuant to § 216.106(c) will be available for inspection and copying at the Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, Washington, D.C. 20235.

Section 216.107

This section provides procedures and standards for the Assistant Administrator's review of state management of a species of marine mammals. In addition, this section provides procedures for the voluntary return of management to the Assistant Administrator by the state.

The Assistant Administrator's direct review of state management begins upon receipt of any substantial factual information suggesting that the state management program is not being implemented or is being implemented inconsistent with the Act, the regulations of this subpart or the state's request for return of management authority.

Upon receipt of any such information, the Assistant Administrator for Fisheries will make a determination on whether or not the state has continued to comply with the Act, the regulations of Subpart H of Part 216 and the state's request for return of management authority. If the Assistant Administrator determines that the state is no longer in compliance, the state will be informed of the Assistant Administrator's intent to revoke management authority and the basis for this determination. The Assistant Administrator will also publish in the **Federal Register** a notice of the intent to revoke management authority. A public hearing will be held if requested by the state or otherwise determined by the Assistant Administrator to be necessary. The state will be provided an opportunity to consult on the deficiencies in state management which caused the Assistant Administrator's determination and the necessary remedial measures. If the state fails to take the necessary remedial measures within 90 days of the notice of intent to revoke provided by the Assistant Administrator, the Assistant Administrator shall revoke management. The Assistant Administrator will then manage the concerned species in accordance with the Act and the regulations of Part 216.

Paragraph (b) of this section provides procedures for the voluntary return of management authority to the Assistant Administrator for Fisheries by the State. The state need only notify the Assistant Administrator of its intent to return management. Unless the Assistant Administrator determines that an emergency exists which requires immediate assumption of management authority, the Assistant Administrator will publish a Notice in the **Federal Register** between 30 and 60 days after receiving notice from the state. This notice will act as the formal assumption of management authority by the Assistant Administrator. As with the revocation of management authority, the Assistant Administrator will then manage the concerned species of marine mammals pursuant to the Act and the regulations of Part 216.

Paragraph (b)(2) of this section provides procedures to be followed in the event that the implementation of any aspect of the state management program is enjoined by court order. Within 30 days of the injunction, the state is to evaluate the effect of the injunction on state management of the species and notify the Assistant Administrator. If the state determines that the injunction precludes effective conservation of the species under the management program, the notice is treated as a notice of intent to return management pursuant to § 216.107(b)(1). If the state determines that the injunction does not preclude effective conservation of the species, the notice is treated as a report submitted pursuant to § 216.106 (c)(1) and reviewed pursuant to § 216.107(a).

Section 216.108

This section provides notification of the states to which management have been returned. Accordingly, it will be updated from time to time when management has been returned to a new state or for a new species.

Applicability to Other Laws, Regulations and Requirements

An environmental assessment has been prepared in conjunction with these proposed regulations. It is available from the Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, Washington, D.C. 20235. Based on the environmental assessment, the Assistant Administrator for Fisheries has determined that the proposed rule would not be a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(c).

The proposed rulemaking is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices to consumers, individual industries, or government agencies; or (3) significant adverse effects on competition, employment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign based enterprises in domestic or export markets. The NMFS has determined, therefore, that the proposed regulations will not constitute a major rule and require no regulatory impact analysis under Executive Order 12291.

The General Counsel of the Department of Commerce has certified that the proposed regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexbility analysis is not required.

Since the number of applicants for a return of marine mammal management authority, under the proposed regulations, is expected to be less than ten, the requirements of the Paperwork Reduction Act do not apply.

List of Subjects in 50 CFR Part 216

Endangered and threatened wildlife, Imports, Marine mammals, Penalties.

Proposal of Regulation

Accordingly, it is hereby proposed to amend 50 CFR Part 216, by revising Subpart H to read as follows:

* * * * *

Subpart H—Transfer of Management Authority to States

Sec.

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Subpart H—Transfer of Management Authority to States

§ 216.101 Purpose and scope of regulations.

The regulations contained in this subpart implement section 109 of the Act which provides for the transfer of marine mammal management authority to the States.

(a) The regulations of this subpart apply to the procedures for the transfer of marine mammal management authority to a state, the form and minimum requirements of a state application for the transfer of management authority, the relationship between Federal and state wildlife agencies both prior and subsequent to the transfer of management authority, and the revocation and return of management authority back to the States.

(b) Nothing in this subpart shall prevent (1) the taking of a marine mammal by or on behalf of a Federal, state or local government official, in accordance with § 216.22 of this part, or (2) the adoption or enforcement of any state law or regulation relating to any marine mammal taken before December 21, 1972.

§ 216.102 Definitions.

The following definitions apply to this part.

(a) "Optimum Sustainable Population" or "OSP" means a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality.

(b) "State management program" means existing and proposed state laws, regulations, policies and other authorities which form the framework for the conservation of a species of marine mammals.

(c) "State regulation" means the whole or part of a state agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of a state agency and which is duly promulgated in accordance with established procedure.

§ 216.103 Review and approval of State request for management authority.

(a) Any state may request the transfer of marine mammal management authority for a species of marine mammals by submitting a written request to the Assistant Administrator for Fisheries. The request must include:

(1) Copies of existing and proposed laws, regulations, policies and other authorities of state law which comprise those aspects of the state management program outlined in paragraph (b) of this section, and, in the case of Alaska, paragraph (d)(1) of this section;

(2) A narrative discussion of the laws, regulations, policies and other authorities which comprise those aspects of the state management program outlined in paragraph (b) of this section, and, in the case of Alaska, paragraph (d) of this section, which explains the program in terms of the requirements of the Act and the regulations of this subpart; and

(3) Supplementary information as required by paragraph (c) of this section.

(b) A request for transfer of marine mammal management authority will not be approved unless it contains the following:

(1) The scientific and common names and estimated range of the species of marine mammals subject to the state management program.

(2) Provisions concerning the take of marine mammals that

(i) Require that the taking of marine mammals be humane as defined by section 3(4) of the Act;

(ii) Prohibit the taking of marine mammals until the following have occurred:

(A) The state, pursuant to the requirements of § 216.104 of this subpart, has determined that the species is at its Optimum Sustainable Population (OSP) and the maximum number of animals that may be taken without reducing the species below its OSP, and, in the case of Alaska, the maximum numbers that can be taken for subsistence uses while allowing the species to increase toward its OSP;

(B) The determination as to OSP and maximum take are final and implemented under state law; and

(C) A cooperative allocation agreement, if required under § 216.105(a) of this subpart, is implemented;

(iii) Prohibit take in excess of the maximum number of animals that may be taken as determined pursuant to § 216.104 of this subpart; provided that for Alaska, subsistence take may be allowed in accordance with paragraph (d)(1)(iv) of this section;

(iv) Prohibit take that is for scientific or public display purposes except such take by or on behalf of the state, or pursuant to a Federal permit issued under § 216.31 of this part; and

(v) Regulate the incidental taking of the species in a manner consistent with section 101(a) (2), (4) and (5) of the Act and Federal regulation, if any.

(3) Procedures for acquiring and evaluating data and other new evidence relating to OSP of the species and the maximum allowable take, and if required on the basis of such evaluation, for amending determinations as to OSP and maximum take and restricting take accordingly.

(4) Procedures for the resolution of differences between the state and the NMFS that might arise during the development of a cooperative allocation agreement pursuant to § 216.105(a) of this subpart.

(5) Procedures for the submission of an annual report meeting the requirements of § 216.106(b) of this subpart to the NMFS regarding the administration of the state management program during the reporting period.

(6) A description of—

(i) The organization of state offices involved in the administration and enforcement of the state management program;

(ii) Any permit system relating to the marine mammals, the laws that apply to such permits, and the procedures to be used in granting or withholding such permits;

(iii) State laws and procedures relating to judicial review of administrative decisions as they relate to the state management program;

(iv) State laws and procedures relating to administrative rulemaking as they relate to the state management program;

(c) In addition to the aspects of the state management program required to be submitted by paragraph (b) of this section, the state shall submit information, in summary form, relating to

(1) The anticipated staffing and funding of state offices involved in the administration and enforcement of the state management program;

(2) Anticpated research and enforcement activities relating to conservation of the species for which management authority is sought; and

(3) Such other materials and information as the Director may request or which the state may deem necessary

or advisable to demonstrate the compatibility of the state management program with the policy and purposes of the Act and the rules and regulations issued under the Act.

(d) In addition to the requirements contained in paragraphs (b) and (c) of this section, a request for the transfer of marine mammal management authority by the State of Alaska must contain the following:

(1) Provisions concerning the take of marine mammals that provide for subsistence use of the species as defined in section 109(f)(2) of the Act by rural Alaska residents in the following manner:

(i) Subsistence uses are to be the priority consumptive use of the species;

(ii) Non-subsistence consumptive uses are to be authorized only if the appropriate state agency finds, on the basis of the administrative record for the rule authorizing non-subsistence consumptive use, that such non-subsistence consumptive use will have no significant adverse impact upon subsistence uses of the species and the regulation of non-subsistence consumptive use will, to the maximum extent practicable, provide economic opportunities for the resident subsistence users of the rural coastal villages in Alaska;

(iii) Subsistence use is to be accomplished in a non-wasteful manner;

(iv) If the species is below OSP, subsistence use is to be allowed at a level of take, if any, which will permit the species to increase toward OSP; and

(v) If restriction of subsistence uses is required, restriction is to be based upon the customary and direct dependence upon the species as a mainstay of livelihood, local residency, and the availability of alternative resources.

(2) A description of the types of economic opportunites to be provided to resident subsistence users pursuant to section 109(f)(2)(B)(ii) of the Act and the procedures to be used in providing these economic opportunities.

(e) To assist states in preparing the state management program for submission, the Assistant Administrator will also, at the written request of any state, make a preliminary review of any aspects of the state management program. This review will be advisory in nature and shall not be binding upon the Assistant Administrator. Nothwithstanding preliminary review by the Assistant Administrator, once any proposed aspects of the state management program have been prepared and submitted in final form, they shall be subject to final review and approval under paragraphs (f) through (h) of this section.

(f) Upon receipt of a request submitted in accordance with paragraph (a) of this section, the Assistant Administrator will publish in the **Federal Register** a notice stating that the state management program under review will be available for inspection at the locations stated in the notice and providing information on how copies may be obtained. The notice will also provide that written data, views, comments, or requests for an informal public hearing on the state management program may be submitted to the Assistant Administrator within the time specified in the notice.

(g) The Assistant Administrator shall approve the request for transfer of management if, after consideration of the materials provided pursuant to this section and public comment received on such material, he determines that the state has developed and will implement a program for the conservation of species that is consistent with the provisions, purposes, policies and goals of the Act, international treaty obligations and the regulations of this part.

(h) Notwithstanding the provisions of paragraph (g) of this section, the state may not exercise management authority, which is retained by the Assistant Administrator, until such time as the determinations required by § 216.104 of this part are final and implemented under state law, and, if a cooperative allocation agreement for the species is required under § 216.105(a) of this part, such agreement is implemented. At such time of final implementation, the Assistant Administrator shall publish in the **Federal Register** a notice transferring management of the species to the state.

§ 216.104 Determinations and hearings under section 109(c)(2).

(a) *Introduction.* In order to gain approval of its marine mammal management program the state must provide for a process, consistent with Section 109(c)(2) of the Act, to determine the optimum sustainable population of the species and the maximum number of animals that may be taken from species it manages. The state process must be completed before the state may exercise any management authority over the subject marine mammals and it must include the elements set forth below.

(b) *Basis, Purpose, and Scope.* The process set forth in this section is applicable to and required for only the determination of the OSP of the species and maximum number that may be taken without reducing it below its OSP and, in the case of Alaska if the species is below OSP, the maximum number of animals that may be taken, if any, for subsistence uses without preventing the species from increasing toward its OSP. The state need not allow the maximum take as determined in accordance with this process that is biologically permissible. The state may change regulations establishing bag limits, quotas, seasons, areas, manner of take, etc. within the maximum biologically permissible take pursuant to its other rulemaking criteria, authority, and procedures. Compliance with the process set forth in this section would not be required again unless the state proposes to modify its determinations of the status of the species with respect to its OSP or the maximum permissible take from that species.

(c) *Initial Determination by the State.* The state agency with management authority for the species shall make initial determinations on the basis of the best scientific evidence available of (1) whether or not it is at its OSP; (2) if so, the maximum number of that species that may be taken without reducing it below its OSP; and (3) if not, in the case of Alaska, the maximum number of animals that may be taken, if any, for subsistence uses without preventing the species from increasing toward its OSP.

(d) *Notice and Review of Initial Determinations and Request for Hearing.* The state agency shall provide notice of its initial determinations to the Assistant Administrator and the public and shall provide access to or copies of the documentation supporting its determinations to the Assistant Administrator and the public. The state agency shall indicate in the Notice of its initial determinations the location(s) and hours during which such documentation may be inspected and the costs, if any, of copies of such documentation. The state agency shall also indicate in the Notice that any interested person may request a hearing regarding the initial determinations and the state shall provide a reasonable time for the request of not less than 30 days, taking into account the time required to advise the public of the initial determinations and to make the supporting documentation readily available to interested persons for their consideration. If a request for a hearing is not made within the prescribed time period, the initial determinations shall be treated as final.

(e) *Notice of Hearing.* If a request for a hearing is made within the prescribed time period by any interested person, the state agency shall provide notice of the hearing to the Assistant Administrator and the public not less than 30 days in advance of the scheduled date(s). The notice shall include the date(s), location(s), and purpose of the hearing, a recitation of the initial determinations, the name(s) of the person(s) who will preside at the hearing, and the manner and date by which interested persons must notify the state agency or presiding officer(s) of their desire to participate in the hearing. The state shall also make available and distribute upon request a list of witnesses and a description of the documentation and other evidence that will be relied upon by the state's witnesses in support of its initial determinations sufficiently in advance of the hearing date so as to allow interested persons to prepare questions and supporting or rebuttal testimony for the hearing.

(f) *Conduct of the Hearing.* (1) The hearing shall be publicly conducted and reported verbatim by an official reporter.

(2) The state shall sponsor all written documentation in support of its determinations with witnesses who are able, by virtue of training and experience, to respond fully to cross-examination regarding the facts and conclusions contained therein provided that, except by agreement of the parties, the state agency may not call any witnesses or introduce any documentation into the record unless the advance notice requirements of paragraph (e) of this section are met with respect to such witnesses or documentation.

(3) Any interested person who has notified the state agency of his desire to participate in the hearing pursuant to paragraph (e) of this section may participate in the hearing by presenting oral or written testimony or cross-examining the witnesses of other parties with respect to matters relevant to the state's initial determinations, provided that any such written documentation must be sponsored by a witness who is able, by virtue of training and experience, to respond fully to cross-examination regarding the facts and conclusions contained therein.

(4) The presiding officer(s) shall conduct the hearing in accordance with such other rules of evidence, criteria, and procedures as are necessary and appropriate for the expeditious and effective determination of the issues. The presiding officer(s) may provide for oral argument an/or written briefs at the end of the hearing.

(5) Final determinations on the uses specified in paragraph (c) of this section must be supported by the best available scientific information so as to insure that any taking will be consistent with the maintenance of OSP.

(g) *Review of the Hearing Record and Final Determinations.* (1) The state agency may provide for either (i) review and evaluation of the hearing record by the presiding officer(s) and transmittal by the presiding officer(s) of recommended final determination to the decision-maker(s) in the state agency; or (ii) review and evaluation of the hearing record, and final determinations by the presiding officer(s); or (iii) review and evaluation of the hearing record and final determinations by the state agency without benefit of any recommendations by the presiding officer(s). In any event, the final determinations by the state agency and/or the presiding officer(s) must be made solely on the basis of the record developed at the hearing. The state agency may not rely on oral or written evidence which was not presented at the hearing and made available to the parties for cross-examination and rebuttal testimony. Any such oral or written information transmitted to the presiding officer(s) or other members of the state agency responsible for the final determinations shall be treated as *ex parte* communications and may not be considered part of the record for decision.

(2) The state agency shall make final determinations of the issues set forth in paragraph (c) of this section and shall include in its statement of final determinations a statement of findings and conclusions and the reasons or basis therefor.

(3) The state agency shall advise the Assistant Administrator and the public of its final determinations and shall provide access to or copies of its decision document.

(h) *Judicial Review.* The state agency's final determinations after a hearing must be supported by substantial evidence in the record of the hearing. Opportunity for judicial review of the state agency's final determinations must be available under state law. The scope of judical review shall be equivalent to that provided for in 5 U.S.C. 706(2) (A) through (E).

§ 216.105 State and Federal responsibilities after transfer of management authority.

(a) After determinations required by § 216.104 of this subpart have been made in respect to a species whose range extends beyond the territorial waters of the state, the state shall not exercise management authority until a cooperative agreement with the Secretary allocating the maximum allowable take has been signed and implemented. The cooperative allocation agreement shall provide procedures for allocating, on a timely basis, the maximum amount of take as determined by the state pursuant to § 216.104 of this part. Such allocation shall give first priority to incidental take within the zone described in section 3(14)(B) of the Act as provided for under section 101(a) of the Act, except that in the case of Alaska, first priority shall be given to subsistence use.

(b) For those species to which paragraph (a) of this section applies, the state may request the Assistant Administrator to regulate the taking of the species within the zone described in section 3(14)(B) of the Act for subsistence uses and/or hunting in a manner consistent with the regulation by the state of such taking within the state. If such a request is made, the Assistant Administrator shall adopt and enforce within such zone, such of the state's regulatory provisions as the Assistant Administrator considers to be consistent with the administration within such zone of section 101(a) of the Act.

(c) If management authority for a species has been returned to a state pursuant to this subpart, the Assistant Administrator shall provide to the state an opportunity to review all requests for permits to remove live animals from habitat within the state for scientific research or public display purposes. If the state finds that issuance of the permit would not be consistent with its management program for the species, the state.

(1) Shall so inform the Assistant Administrator within 30 days of its receipt of the application and the Assistant Administrator shall not issue the permit; and

(2) The Assistant Administrator shall provide to the permit applicant and the state an opportunity to adjust the permit application or otherwise reconcile it with the state management program for the species.

(d) After management of a species has been returned to the state, state and Federal authorities shall cooperate to the maximum extent practicable in conserving the species of marine mammals.

§ 216.106 Monitoring and review of State management program.

(a) The Assistant Administrator has responsibility to monitor and review all state management programs approved pursuant to this subpart.

(b) In order to facilitate such review, each state to which management authority has been returned shall submit an annual report, not later than 120 days after the close of such state's first full fiscal or calendar year following the effective date of the Assistant Administrator's approval of the state management program, and at the same time each following year, or at such other time as may be agreed upon. The report shall contain the following information current for each reporting period:

(1) Any changes in the state laws or regulations which comprise those aspects of the state management program submitted pursuant ot §216.103(b), and in the case of Alaska, §216.103(d), or this subpart;

(2) Pertinent new data on the marine mammal species or the marine ecosystems in question including a summary of the status, trend and general health of the species;

(3) A summary of available information relating to takings under the state management program;

(4) A summary of state actions to protect species' habitat;

(5) A summary of all state research activity on the species;

(6) Any significant changes in the information provided with the original request for transfer of management authority;

(7) A summary of enforcement activity;

(8) A summary of present budget and staffing for the marine mammal activities in the categories of research, management and enforcement;

(9) Any other information which the Assistant Administrator may request, or which the state deems necessary or advisable to facilitate review by the Assistant Administrator of state management of the species.

(c) Each state having an approved management program shall file a report whenever any of the following occurs:

(1) Any change in a relevant state law or regulation (amendments, repealers, or new legislation or regulations) as submitted pursuant to paragraphs (b)(2) through (b)(5) of § 216.103 of this subpart that may impair the state's ability to implement the program;

(2) Any significant natural or manmade occurrence or any new scientific information that may warrent reconsideration of the determinations made pursuant to § 216.104 of this subpart.

(d) All components of the state request for return of management authority, as well as annual reports submitted under paragraph (b) of this section and any reports submitted under paragraph (c) of this section, shall be available for inspection and copying at the Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, Washington, D.C. 20235.

§ 216.107 Revocation and return of State management.

(a) *Revocation of management.* The Assistant Administrator shall have responsibility to review management of a species returned to a state under this subpart and to determine whether or not the state management program continues to comply with the requirements of the Act, this subpart and the state's request for returning management authority as submitted pursuant to § 216.103 of this subpart.

(1) Upon receipt of any substantial factual information suggesting that the state management program is not being implemented or is being implemented in a manner inconsistant with the Act, this subpart, or the state's request for return of management authority, the Assistant Administrator shall, as soon as practicable, determine whether or not the state continues to comply with the requirements of the Act, this subpart and the state's request for return of management authority.

(2) Whenever pursuant to a review as specified in paragraph (a)(1) of this section, the Assistant Administrator determines, that any substantial aspect of the state management program is not in compliance with the requirements of the Act, this subpart or the state's request for return of management authority, he shall provide written notice to the state of his intent to revoke management authority, together with a statement, in detail, of those actions or failures to act upon which such intent to revoke is based. The Assistant Administrator shall publish notice of such intent to revoke in the **Federal Register** and shall conduct an informal public hearing on the matter if requested by the state or if the Assistant Administrator otherwise determines it to be necessary. The Assistant Administrator shall provide to the state an opportunity for consultation between the Assistant Administrator and the state concerning such actions or failures and necessary remedial actions to be taken by the state.

(3) If within 90 days after notice is provided under paragraph (a)(2) of this section, the state has not taken such remedial measures as are necessary, in the judgment of the Assistant Administrator to bring the state management program into compliance with the provision of the Act, this subpart and the state's request for return of management authority, the Assistant Administrator shall revoke the transfer of management authority by written notice to the state and publication in the **Federal Register.**

(b) Voluntary return of management authority to the Assistant Administrator.

(1) If a state desires to return management of a species of marine mammals to the Assistant Administrator, it shall provide to the Assistant Administrator notice of intent to return management. The Assistant Administrator, shall accept the return of management, and such return shall become effective, upon publication of a notice in the **Federal Register** to this effect no sooner than 30 days (except in an emergency as determined by the Assistant Administrator) nor longer than 60 days after the state has provided notice of its intent to return management.

(2) If implementation of any aspect of the state management program is enjoined by court order, the state shall advise the Assistant Administrator of such injunction and its effect on the state management program. If the state determines that the effect of the injunction is to preclude effective conservation of the species under the terms of the state management program, it shall so notify the Assistant Administrator and such notification shall be treated as a notice of intent to return management as provided in paragraph (b)(1) of this section. If the state determines that the injunction does not preclude effective conservation of marine mammals under the terms of the state management program, it shall so notify the Assistant Administrator together with the basis for the state's determination and such notice shall be treated as a report submitted pursuant to the terms of § 216.106(c)(1) of this part. In either case, the state shall provide notice to the Assistant Administrator as soon as practicable but not more than 30 days after issuance of the injunction.

(c) When revocation of a management authority pursuant to paragraph (a) of this section becomes final, or when a state returns management pursuant to paragraph (b) of this section, the Assistant Administrator shall resume such management authority and regulate the taking and provide for the conservation of the species within the state in accordance with the provisions of the Act and the regulations of this part.

§ 216.108 List of States to which management has been transferred.

The following states have received management authority pursuant to this part for the species listed: [Reserved]

(16 U.S.C. 1361, et seq., as amended by Pub. L. 97-98)

Dated: April 12, 1982.

Robert K. Crowell,

Deputy Executive Director, National Marine Fisheries Service.

[FR Doc. 82-12872 Filed 5-11-82; 8:45 am]

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Wednesday
May 12, 1982

Part VI

Department of the Interior

Fish and Wildlife Service

Transfer of Marine Mammal Management Authority to States

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

Procedures for Transfer of Marine Mammal Management Authority to States

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The Fish and Wildlife Service is proposing a rule to implement recent amendments to the Marine Mammal Protection Act. The proposed regulations establish procedures for the transfer of marine mammal management authority back to the States, the form and minimum requirements of a State application for the transfer of management authority, the relationship between Federal and state wildlife agencies both prior and subsequent to the transfer of management authority and the revocation and return to the Fish and Wildlife Service of management authority once transferred to the States.

DATE: Comments on this proposal must be submitted on or before July 12, 1982.

ADDRESS: Interested persons or organizations are requested to submit comments to the Chief, Division of Wildlife Management, United States Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Mr. James Gillett, Chief, Division of Wildlife Management, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240 (202) 632-2202.

SUPPLEMENTARY INFORMATION: On October 9, 1981, the President approved Pub. L. 97-58 amending various provisions of the Marine Mammal Protection Act ("Act"), 16 U.S.C. 1361 *et seq.* One aspect of these amendments altered the mechanism for the return of marine mammal management to the States under section 109 of the Act, 16 U.S.C. 1379. Under the pre-existing statutory procedures, States were required to request the Fish and Wildlife Service ("Service") to return management of the species to the State. If a State sought authority to allow taking of the marine mammal species under its management, the State was required to request the Fish and Wildlife Service to waive the moratorium on the taking of the species. This request required a formal Federal hearing before an administrative law judge concerning the status of the requested species, and the permissible number of animals to be taken, as well as consideration of the State's proposed laws and regulations that would govern the taking of the species. The proposed waiver of the moratorium to allow taking of the species also required compliance with the provisions of the National Environmental Policy Act. In reviewing these procedures, Congress found that the lengthy process entailed in the return of management authority to States had resulted in a situation in which the goal of the Act—effective management to maintain healthy populations of marine mammals—was being impaired.

To remedy this problem the Amendments establish a simplified procedure under which a State could resume management of marine mammal species. This procedure entails a three step process. First, the State must submit a request to the Service for return of management authority for a given species or a number of species of marine mammals. This request and its supporting documentation are reviewed by the Service to determine if the State has developed and will implement a program for the conservation of the species which meets certain requirements set forth in the Act. Second, if the Service finds that the State program meets this initial requirement, the State must make a determination, under procedures set by the Act, of the optimum sustainable population ("OSP") of the species and the maximum allowable take of the species which is consistent with maintaining the species at OSP. Third, these determinations must be implemented through State laws and regulations and, if the range of the species extends beyond the territorial waters of the State, the State and Federal governments must agree on a process for allocating the take of the species between areas under respective State and Federal jurisdictions. Once this "cooperative allocation agreement" has been signed and implemented and the OSP and maximum allowable take determinations are final and implemented under State law, the State will have exclusive authority to manage marine mammals within the State, including its territorial waters. The only exceptions to this assumption of exclusive jurisdiction would be for takings regulated by the Federal government and takings by non-State personnel for scientific and display purposes, activities which remain under the control of the Federal government pursuant to section 109 of the Act.

The regulations proposed herein will implement the statutory procedures for return of marine mammal management authority to the States. These regulations apply to the species of marine mammals currently managed by the Service. These species are the polar bear, sea otter, walrus, dugong, manatee and marine otter. Other species of marine mammals are managed by the National Marine Fisheries Service which is proposing corresponding regulations concurrent with this proposal. Section 18.52 is definitional. The form and mimimum requirements of a State application for transfer of management authority are set forth in §§ 18.53 and 18.54. The relationship between Federal and State wildlife agencies both prior and subsequent to the transfer of management authority is defined in §§ 18.53(h), 18.55, and 18.56. The revocation and return of management authority is governed by § 18.57. In addition, § 18.58 will list States to which management authority has been returned. Specific provisions of the Service's proposed regulations are discussed below.

Section 18.51

Paragraph (a) of this section establishes the purpose of the regulations as explained above and defines the scope of the proposed regulations.

Paragraph (b) of this section excludes certain aspects of marine mammal management authority from that affected by the proposed regulations. Taking off marine mammals by Federal and local government officials in the course of their duties is governed by § 18.22 of this part and therefore the requirements of that section remain in effect. Section 18.22 relates to the taking of stranded and beached marine mammals and the taking of marine mammals for the protection of public health or welfare. In addition, since the Act does not regulate disposition of marine mammals taken before its effective date, December 21, 1972, these regulations reflect that exception. (Section 18.14 of this part does impose certain notification requirements pertaining to marine mammals taken before December 1, 1972). Accordingly, a State may adopt and enforce any State law relating to any marine mammal taken before that date without requesting a return of management authority under these regulations.

Section 18.52

This section provides definitions for several terms used primarily in this subpart. These regulations, however, apply to the entire Part 18. "Optimum Sustainable Population" or "OSP" is defined consistent with the existing

National Marine Fisheries Service definition, found at 50 CFR 216.3. Congress has specifically found that this definition accurately reflects the meaning of the term and the intent of Congress in passing the Act (H.R. Rep. No. 97-228, 97th Cong., 1st Sess., p. 16 (1981)). It is important to note that OSP is a range of population levels. The upper limit of the range is the largest average supportable level within the ecosystem (carrying capacity) The lower limit of the range is the population level for a given species or stock that results in maximum net productivity.

This section also defines "State management program." The State management program consists of the legal framework under which the State will manage marine mammals. Components of this framework which are specifically required to be submitted in the State's request for return of management authority are set forth in paragraphs (b), (c) and, in the case of Alaska, (d) of § 18.53 of the proposed regulations.

Section 18.53

This section defines the form and minimum requirements of a State request for return of management authority. If a State is requesting management authority from the National Marine Fisheries Service as well as the Fish and Wildlife Service, the State may combine the request information in a single document and send copies to both agencies. The request must contain two elements: Certain aspects of the proposed State management program and supplemental information pertaining to the State management program. The request must include the text of laws, regulations, policies and other authorities of State law, and a narrative discussion of how these authorities blend to form a framework that meets the new requirements of the Act.

It is important to note that although the State management program is defined broadly by § 18.52, the request for transfer of management authority need not include all aspects of the State management program. Therefore, the State need not provide specific laws or regulations pertaining to the manner, times or amount of take, unless specifically required by § 18.53. Thus, the State need not submit as part of its request regulations pertaining to such aspects of take as bag limits, seasons, or the mimimum rifle caliber that can be used in taking the species. However, the request must include, for example, a law or regulation that requires taking to be humane (see § 18.53(b)(2)(i)) even though this is a retriction on the manner of taking, since it is part of the overall framework for management and specifically required by the Act and, as a result, the regulations.

If any necessary aspect of State law has yet to be enacted, proposed language or a commitment of intention to introduce legislation or adopt regulations must be submitted by the Governor. The Act requires the Director of the Service to find that the State "has developed and will implement" a program for the conservation of the species before management authority can be transferred. This finding can be made for some aspects of the State management program (e.g., those required to be provided by § 18.53(b)(2)(v), (b)(3), (b)(5), (b)(6)(ii) and (d)(2)) even though only proposed language or a commitment of intention is submitted. Thus, submittal of these aspects of the State management program in pre-adoption form will not preclude review and approval of the State management program. However, the failure to enact a provision substantially as proposed can be grounds for revocation of management authority pursuant to § 18.57

It should also be noted that if a State has been transferred management authority and that authority has been returned to, or revoked by, the Director pursuant to § 18.57 of the proposed regulations, the State may, at a later date, once again request the transfer of management authority by complying with § 18.53 of the proposed regulations.

Paragraph (b) of this section lists those components of the State management program which must be submitted in the request for return of management authority. However, section 109 of the Act requires Alaska's management program to contain additional components relating to regulating subsistence take by rural Alaska residents (both Natives and non-Natives). These requirements are set out in paragraph (d) of this section. The requirements of paragraph (b) and, in the case of Alaska, paragraphs (b) and (d), are considered to be the minimum amount necessary to enable the Director to make the determination, required by section 109(b)(1)(A) of the Act, of whether the State program "is consistent with the purpose, policies and goals of (the) Act and with international treaty obligations."

Section 18.53(b)(1) requires the State to list the scientific and common names and estimated range of the species of marine mammals for which it seeks management authority. A state may request the transfer of management for more than one species. If this is the case, those components of the State management program that apply to more than one species do not need to be repeated for each species. Rather, the State should list the species and the components of the State management program that apply to some or all of the species. Those components of the State management program that apply to individual species should be so designated. The State should discuss which components apply generally and which apply specifically in the narrative discussion required by § 18.53(a)(2).

Paragraphs (b)(2)(i) through (b)(2)(v) and paragraph (d)(1) of this section are taken directly from section 109 of the Act and therefore require little additional explanation. A few points should, however, be noted.

First, a State to which management authority has been transferred for a given species is required to regulate the taking of that species so as to prevent its population from declining below its OSP. However, the Act provides that in the case of Alaska, subsistence may be allowed even if the species is below its OSP, as long is the amount of subsistence take will nevertheless permit the species to increase toward its OSP. Paragraphs (b)(2)(ii) and (d)(1)(iv) of this section reflect this distinction.

Second, in accordance with the Act, paragraph (b)(2)(iv) requires the State to prohibit take for scientific and display purposes, with the exception of take for such purposes done by or on behalf of the State (management of this take is retained by the Fish and Wildlife Service). However, the Federal regulation of take for scientific and display purposes will be consistent with State management as provided by § 18.55(c) of the proposed regulations.

Third, paragraph (b)(2)(v) requires the State to regulate the incidental taking of the species in a manner consistent with the Act and any Federal regulation of incidental taking. While the State regulations need to be consistent with the Federal regulations, they need not be identical.

Paragraph (b)(3) of this section requires that the State program contain procedures for acquiring and evaluating data relating to OSP and the maximum allowable take of the species. This review need not comply with § 18.54 procedures pertaining to *determining* OSP and the maximum allowable take of the species. However, if the review, which should be done at least annually, discloses that OSP and maximum allowable take determinations may need to be adjusted, the State must use those procedures required by § 18.54 in making these adjustments.

Paragraph (b)(6) of this section lists certain aspects of the State management program which must be considered by the Director in making a determination as to whether the State's program is consistent with the Act.

The description of the organization of State offices involved in the administration and enforcement of the State management program need describe only the various responsibilities of these offices as they relate to marine mammal management and how these offices relate to one another. In the latter regard, an organizational chart would be helpful.

Paragraph (b)(6)(ii) relates to permits involving marine mammals. The State should describe what types of permits apply to actions involving marine mammals, the laws under which such permits are granted, and what factors guide discretion on permit applications.

The State should discuss, pursuant to paragraph (b)(6)(iii), certain aspects of judicial review such as the courts which have jurisdiction to review administrative decisions, who may challenge administrative decisions, the scope of judicial review, and the range of available remedies.

The State should also discuss, under paragraph (b)(6)(iv), such aspects of administrative rulemaking as notice procedures, public comment requirements, *ex parte* rules and hearing requirements.

Although paragraphs (b)(6)(ii) through (b)(6)(iv) pertain to State laws on specific aspects of marine mammal management, copies of these laws do not need to be included with those provided pursuant to § 18.53(a)(1). A general description of the provisions, limitations and exceptions of these laws will be sufficient.

Section 18.53(c) requires the State to submit in its request for the transfer of management authority supplemental information pertaining to the State management program. This information need only be submitted in summary form. It is believed that compiling the information in this form will not unduly burden the State, yet will provide the Director with a baseline from which to evaluate the subsequent administration of marine mammal management by the State.

Section 109(f)(1)(B) of the Act requires Alaska to provide economic opportunities to resident subsistence users of rural coastal village in the event non-subsistence consumptive uses of marine mammals will be allowed. Section 18.53(d)(2) of the proposed regulations requires Alaska to describe the types of economic opportunities to be provided in this event. Alaska need not specify which types of economic opportunities would be available in specific cases. Instead, the State should describe, in addition to which general types of economic opportunities will be made available, the procedures to be used in deciding (a) when these opportunities will be made available, (b) the extent to which they will be made available, and (c) to whom they will be made available.

Paragraphs (e) through (h) of § 18.53 provide procedures for the Director's review of a request for return of management authority. The preliminary review procedures of paragraph (e) are not designed as a mechanism for piecemeal review of the State's management program. This subsection can be used either to gain guidance on an entire program before formal submission, or as a means of evaluating proposed aspects of the State management program before final enactment and submission. Furthermore, pursuant to section 109(b)(2) of the Act, 16 U.S.C. 1379(b)(2), the State may not manage marine mammals, even though the Director has approved its management program, until the events listed in § 18.53(h) of these regulations have occurred. When the Director finds that the State's OSP and maximum allowable take determinations are final and implemented under State law, and a cooperative allocation agreement, if necessary, has been implemented, a notice will be published in the **Federal Register** formally transferring management authority. The State can begin management at that time.

Section 18.54

This section describes procedures which the State must provide for in its management program and employ in determining the OSP of a given species and the maximum allowable number of animals that can be taken without reducing the population below OSP. These procedures are required by section 109(c)(2) of the Act, 16 U.S.C. 1379(c)(2).

The OSP and maximum allowable take determination process is composed of three steps. First, pursuant to paragraph (c) of this section, the State must make initial determinations regarding OSP and maximum allowable take. Second, under paragraph (d), the State must provide public notice of its initial determinations. The State must make copies of its initial determinations and supporting documentation available for public inspection and must provide a reasonable time in which a request for a public hearing can be made.

The third step is finalization of the determinations. If no request for a public hearing is made within the prescribed time period, the initial determinations become final. If, on the other hand, a request for public hearing is made, the determinations do not become final until the State has complied with the procedures of paragraphs (e) through (g) of this section.

Paragraph (e) requires public notice of the State hearing. This notice must include certain information including the State's initial determinations, the date(s), location(s) and purpose of the hearing, the name(s) of person(s) who will preside at the hearing and information on how interested persons can participate in the hearing. The State must also make available a description of the documentation and the witnesses upon which it will rely in the hearing. This information must be made available sufficiently in advance of the hearing to allow preparation by interested parties of supporting or rebuttal testimony.

Paragraph (f) describes procedures which must be employed in the hearing itself. The hearing must be transcribed verbatim. In accordance with the act, final determinations must be based on the best available scientific information. This information must be of sufficient quantity and quality to insure that any taking will be consistent with the maintenance of OSP. *See, Committee for Humane Legislation v. Richardson,* 414 F. Supp. 297 (D.D.C. 1976), *aff'd* 540 F.2d. 1141 (D.C. Cir. 1976). In the case of Alaska when the species is below OSP, maintenance of OSP includes the amount of subsistence take which will allow the species to increase toward OSP. In the recent amendments to the Act, Congress specifically overruled the decision of the United States District Court in *People of Iogiak v. United States,* 470 F. Supp. 423 (D.D.C. 1979), which had exempted take of marine mammals by Alsaka natives from State management. Amended section 101(b) now allows State management of subsistence take by Alaska natives under section 109. Moreover, section 101(b) now restricts the definition of Alaska natives to those natives who reside in Alaska.

Interested persons must be afforded the opportunity to participate in the hearing to the extent specified in paragraph (f)(3). Other aspects of hearing procedures are left to the discretion of the presiding officer(s) in accordance with State law.

Paragraph (g) implements the Act's procedures for review of the hearing record. The State may employ any one of three methods for reviewing the record and making the final determinations based on that record. Independent of which method is used, the final determinations must be based only on information contained in the record of the public hearing. Once the final determinations are made, the State must develop a supporting decision document. This document must contain a statement of these determinations including findings and conclusions on all material issues and the reasons and basis therefor. This decision documentation must be made available to the Director and the public.

Finally, paragraph (h) of this section prescribes the parameters for judicial review of the final OSP and maximum take determinations.

The procedures required by § 18.54 apply only to OSP and maximum allowable take determinations. However, in the case of Alaska when the species is below OSP, the Act provides that subsistence take may be allowed only to the extent that the take will nevertheless allow the species to increase toward OSP. Since the maximum extent of subsistence take is subject to and must be based upon the OSP determination, the maximum allowable extent of subsistence take must also be determined in the same process. However, the extent of subsistence take that will actually be permitted within the maximum amount need not be determined through § 18.54 procedures.

If the species is at or above OSP, the State need not employ § 18.54 procedures to determine such regulatory controls on take as bag limits and quotas within the maximum biologically allowable take. Correspondingly, changes in bag limits, quotas and other similar regulatory controls on take can be made at any time through applicable State rulemaking procedures as long as the amount of take does not exceed the maximum allowable level of take as determined through § 18.54 procedures.

Section 18.55

This section describes Federal and State responsibilities after transfer of management authority. Paragraph (a) describes the cooperative allocation agreement. In the case of a species whose range extends beyond the territorial waters of a State, this agreement is actually a prerequisite to the transfer of management authority. Once implemented, it describes a jurisdictional relationship between the Federal and State government after transfer. The purpose of the agreement is to provide procedures to allocate between the Fishery Conservation Zone (FCZ) under Federal jurisdiction and lands and waters under State jurisdiction the maximum allowable take which the State has determined pursuant to § 18.54. This instrument was designed by Congress to ensure that the State does not preempt all available take so as to impinge upon federal incidental take determinations in the FCZ, and to ensure that the Secretary does not make unjustifiable claims respecting numbers of animals purported to be needed to carry out his responsibilities under section 101 of the Act. *See* H.R. Rep. No. 97–228, 97th Cong., 1st Sess. p. 26 (1981).

Pursuant to paragraph (b) of this section, once a State has management authority returned, it can request the Director to regulate hunting and subsistence take of the species within the FCZ in a manner consistent with State regulation of such take. The Director shall adopt, after notice and comment procedures, those State regulatory provisions that he finds to be consistent with his administration of section 101(a) of the Act, 16 U.S.C. 1371(a), within the FCZ. This process was established by section 109(d)(2) of the Act as a mechanism for the Federal adoption of State regulations in areas beyond State territorial waters. H.R. Rep. No. 97–228, 97th Cong., 1st Sess., p. 26 (1981).

In accordance with the terms of the Act, the Service remains responsible for regulating the take of marine mammals for scientific and public display purposes despite transfer of management authority to the State. Pursuant to the Act, and paragraph (c) of § 18.55 of the proposed regulations, the State is granted the opportunity to review applications for such take for consistency with the State's management of the species. Under the provisions of this subsection, the Director will notify the State upon receipt of an application to remove live animals from the wild within the State for scientific research or public display purposes. The State has 30 days in which to review the application. If the State finds that the permit would not be consistent with its management of the species and so notifies the Director, the Director would not issue the permit. However, the Director will provide to the State and the applicant an opportunity, through consultations or other appropriate mechanisms, to adjust the permit application so that it is consistent with the State's management program.

Paragraph (d) of § 18.55 encourages the State and the Service to cooperate, to the maximum extent practicable, in conserving the species of marine mammals. This may include cooperation in research, enforcement and other aspects of marine mammal management. It is believed that such cooperative activities can provide the optimum utilization of the resources, personnel, expertise, knowledge and experience of both State and Federal wildlife agencies.

Section 18.56

This section provides procedures for the monitoring and review of the State management program. Under section 109(e) of the Act, 16 U.S.C. 1379(e), the Director has the responsibility, after management authority has been returned to the State, to monitor the State's implementation of its program. To facilitate this review process, the State is required to submit an annual report on its management of the species, and shall make a report pursuant to paragraph (c) of this section whenever either of the two events listed in that subsection occur.

Paragraph (b) defines the components of the annual report. Any substantive changes in the State laws or regulations provided in the original request pursuant to § 18.53(b) and, in the case of Alaska, § 18.53(d), must be described in the annual report. The report should include a discussion of how such changes affect implementation of the management program. However, the extent of each discussion should be proportional to the importance of that change. For example, a change in rulemaking procedures (§ 18.53(b)(6)(iv)) will require less attention than a change in laws originally provided, pursuant to § 18.53(b)(2), concerning the take of the species.

Other than paragraph (b)(1), all other categories of information are limited by qualifiers such as "pertinent" and "significant" or simply seek information in summary form. Thus, the information provided need not be exhaustive, but should be sufficiently detailed and complete to provide the Director with a fair assessment of the administration of the State management program.

Paragraph (c) of this section requires the State to file a report when either of two specified events occurs. These events concern either the very foundation of the State management program or the status of the species itself and therefore require immediate review by the Director.

A report submitted pursuant to paragraph (c) should describe the event and how it affects marine mammal management. The extent of discussion should correspond to the magnitude of the problem for either the State management program or the status of the species. For example, a change in regulatory procedures for acquiring and evaluating data relating to OSP (§ 18.53(b)(3)) would in most cases require less discussion than a statutory or regulatory amendment allowing take in excess of the maximum allowable take determined pursuant to § 18.54 (§ 18.53(b)(2)(iii)).

Paragraph (d) of § 18.56 provides that all components of the State management program as well as annual reports submitted pursuant to § 18.56(b) and reports submitted pursuant to § 18.56(c) will be available for inspection and copying at the Division of Wildlife Management, U.S. Fish and Wildlife Service, Washington, D.C.

Section 18.57

This section provides procedures and standards for the Director's review of state management of a species of marine mammals. In addition, this section provides procedures for the voluntary return of management to the Director by the state.

The Director's direct review of state management begins upon receipt of any substantial factual information suggesting that the State management program is not being implemented or is being implemented inconsistent with the Act, the regulations of this subpart or the State's request for return of management authority.

Upon receipt of any such information, the Director will make a determination of whether or not the State has continued to comply with the Act, the regulations of subpart F of Part 18 and the State's request for return of management authority. If the Director's determination is that the State is no longer in compliance, the State will be informed of the Service's intent to revoke management authority and the bases for the determination. The Director will also publish in the **Federal Register** a notice of intent to revoke management authority. A public hearing will be held if requested by the State or otherwise determined by the Director to be necessary. The State will be provided an opportunity to consult on the deficiencies in State management which caused the Director's detemination and the necessary remedial measures. If the State fails to take the necessary remedial measures within 90 days of the notice of intent to revoke provided by the Director, the Director shall revoke management. The Director will then manage the concerned species in accordance with the Act and the regulations of Part 18.

Paragraph (b) of this section provides procedures for the voluntary return of management authority to the Director by the State. The State need only notify the Director of its intent to return management. Unless the Director determines that an emergency exists which requires immediate assumption of management authority, the Director will publish a Notice in the **Federal Register** between 30 and 60 days after receiving notice from the State. This Notice will act as the formal assumption of management authority by the Director. As with the revocation of management authority, the Director will then manage the concerned species of marine mammals pursuant to the Act and the regulations of Part 18.

Paragraph (b)(2) of this section provides procedures to be followed in the event that the implementation of any aspect of the State management program is enjoined by court order. Within 30 days of the injunction the State is to evaluate the effect of the injunction on State management of the species and notify the Director. If the State determines that the injunction precludes effective conservation of the species under the management program, the notice is treated as a notice of intent to return management pursuant to § 18.57(b)(1). If the State determines that the injunction does not preclude effective conservation of the species, the notice is treated as a report submitted pursuant to § 18.56(c)(1) and reviewed pursuant to § 18.57(a).

Section 18.58

This section provides notification of the States to which management have been returned. Accordingly, it will be updated from time to time when management has been returned to a new State or for a new species.

National Environmental Policy Act

A draft environmental assessment has been prepared in conjunction with this proposal. It is on file in the Division of Wildlife Management, Room 506, Matomic Building, 1717 H Street, NW, Washington, D.C. 20240, and may be examined by appointment during regular business hours. Based on the draft environmental assessment, the Director has determined that the proposed rules would not be a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(C). A determination will be made at the time of final rulemaking as to whether the final regulation is a major Federal Action significantly affecting the quality of the human environment within the meaning of that section.

Primary Author

The primary author of this proposal is Frank J. Ruswick, Jr., Division of Conservation and Wildlife, Office of the Solicitor, Department of the Interior.

Note.—The Department of the Interior has determined that this is not a major rule and does not require preparation of a regulatory analysis under Executive Order 12291.

The Department has also determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. These determinations are discussed in more detail in a Determination of Effects which has been prepared by the U.S. Fish and Wildlife Service.

The information collections contained in this proposed regulation are not subject to Office of Management and Budget clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507) since there are fewer than ten respondents annually. The regulation applies only to the States of Alaska, Florida, California, Oregon, and Washington.

List of Subjects in 50 CFR Part 18

Administrative practice and procedure, Alaska, Intergovernmental Relations, Export, Imports, Transportation, and Marine mammals.

Proposal of Regulation

PART 18—MARINE MAMMALS

Accordingly, it is hereby proposed to amend 50 CFR Part 18, by:

Subpart F is revised as follows:

Subpart F—Transfer of Management Authority to the States

Subpart F—Transfer of Management Authority to States

Note.—The information collections contained in this Subpart F are not subject to Office of Management and Budget clearance under 44 U.S.C. 3507 since there are fewer than ten respondents annually.

§ 18.51 Purpose and scope of regulations.

The regulations contained in this subpart implement section 109 of the Act which provides for the transfer of marine mammal management authority to the States.

(a) The regulations of this subpart set forth the procedures for the transfer of marine mammal management authority to a State, the form and minimum requirements of a State application for the transfer of management authority, the relationship between Federal and State wildlife agencies both prior and subsequent to the transfer of management authority, and the revocation and return of management authority back to the States.

(b) Nothing in this subpart shall prevent (1) the taking of a marine mammal by or on behalf of a Federal, State or local government official, in accordance with § 18.22 of this part, or (2) the adoption or enforcement of any State law or regulation relating to any marine mammal taken before December 21, 1972.

§ 18.52 Definitions.

The following definitions apply to this part.

(a) "Optimum Sustainable Population" or "OSP" means a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality.

(b) "State management program" means existing and proposed State laws, regulations, policies and other authorities which form the framework for the conservation of a species of marine mammals.

(c) "State regulation" means the whole or part of a State agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of a State agency and which is duly promulgated in accordance with established procedure.

§ 18.53 Review and approval of State request for management authority.

(a) Any State may request the transfer of marine mammal management authority for a species of marine mammals by submitting a written request to the Director, U.S. Fish and Wildlife Service. The request must include:

(1) Copies of existing and proposed laws, regulations, policies and other authorities of State law which comprise those aspects of the State management program outlined in paragraph (b) of this section, and, in the case of Alaska, paragraph (d)(1) of this section;

(2) A narrative discussion of the laws, regulations, policies and other authorities which comprise those aspects of the State management program outlined in paragraph (b) of this section, and, in the case of Alaska, paragraph (d) of this section, which explains the program in terms of the requirements of the Act and the regulations of this subpart; and

(3) Supplemental information as required by paragraph (c) of this section.

(b) A request for transfer of marine mammal management authority will not be approved unless it contains the following:

(1) The scientific and common names and estimated range of the species of marine mammals subject to the State management program.

(2) Provisions concerning the take of marine mammals that—

(i) Require that the taking of marine mammals be humane as defined by section 3(4) of the Act;

(ii) Prohibit the taking of marine mammals until the following have occurred:

(A) The State, pursuant to the requirements of § 18.54 of this subpart, has determined that the species is at its Optimum Sustainable Population (OSP) and the maximum number of animals that may be taken without reducing the species below its OSP and, in the case of Alaska, the maximum number that can be taken for subsistence uses while allowing the species to increase toward its OSP;

(B) The determination as to OSP and maximum take are final and implemented under State law;

(C) And a cooperative allocation agreement, if required under § 18.55(a) of this subpart, is implemented;

(iii) Prohibit take in excess of the maximum number of animals that may be taken as determined pursuant to § 18.54 of this subpart; provided that for Alaska, subsistence take may be allowed in accordance with paragraph (d)(1)(i) of this section;

(iv) Prohibit take that is for scientific or public display purposes except such take by or on behalf of the State, or pursuant to a Federal permit issued under § 18.31 of this part; and

(v) Regulate the incidental taking of the species in a manner consistent with section 101(a) (2), (4) and (5) of the Act and Federal regulation, if any.

(3) Procedures for acquiring and evaluating data and other new evidence relating to OSP of the species and the maximum allowable take, and if required on the basis of such evaluation, for amending determinations as to OSP and maximum take and restricting take accordingly.

(4) Procedures for the resolution of differences between the State and the Service that might arise during the development of a cooperative allocation agreement pursuant to § 18.55(a) of this subpart.

(5) Procedures for the submission of an annual report meeting the requirements of § 18.56(b) of this subpart to the Service regarding the administration of the State management program during the reporting period.

(6) A description of:

(i) The organization of State offices involved in the administration and enforcement of the State management program;

(ii) Any permit system relating to marine mammals, the laws that apply to such permits, and the procedures to be used in granting or withholding such permits;

(iii) State laws and procedures relating to judicial review of administrative decisions as they relate to the State management program;

(iv) State laws and procedures relating to administrative rulemaking as they relate to the State management program;

(c) In addition to the aspects of the State management program required to be submitted by paragraph (b) of this section, the State shall submit information, in summary form, relating to:

(1) The anticipated staffing and funding of State offices involved in the administration and enforcement of the State management program;

(2) Anticipated research and enforcement activities relating to conservation of the species for which management authority is sought; and

(3) Such other material and information as the Director may request or which the State may deem necessary or advisable to demonstrate the compatibility of the State management program with the policy and purposes of the Act and the rules and regulations issued thereunder.

(d) In addition to the requirements contained in paragraphs (b) and (c) of this section, a request for the transfer of marine mammal management authority by the State of Alaska must contain the following:

(1) Provisions concerning the take of marine mammals that provide for subsistence use of the species as defined in section 109(f)(2) of the Act by rural Alaska residents in the following manner:

(i) Subsistence uses are to be the priority consumptive use of the species;

(ii) Non-subsistence consumptive uses are to be authorized only if the appropriate State agency finds, on the basis of the administrative record for the rule authorizing non-subsistence consumptive use, that such non-subsistence consumptive use will have no significant adverse impact upon subsistence uses of the species and the regulation of non-subsistence consumptive use will, to the maximum extent practicable, provide economic opportunities for the resident subsistence users of the rural coastal villages in Alaska;

(iii) Subsistence use is to be accomplished in a non-wasteful manner;

(iv) If the species is below OSP, subsistence use may be allowed only to the extent of the maximum level of take, if any, which will permit the species to increase toward OSP; and

(v) If restriction of subsistence uses is required, restriction is to be based upon the customary and direct dependence upon the species as a mainstay of livelihood, local residency, and the availability of alternative resources.

(2) A description of the types of economic opportunities to be provided to resident subsistence users of rural coastal villages in the event non-subsistence consumptive uses of marine mammals will be allowed, and the procedures to be used in providing these economic opportunities.

(e) To assist States in preparing the State management program for submission, the Director will, at the written request of any State, make a preliminary review of any aspects of the State management program. This review will be advisory in nature and shall not be binding upon the Director. Notwithstanding preliminary review by the Director, once any proposed aspects of the State management program have been prepared and submitted in final form, they shall be subject to final review and approval under paragraphs (f) through (h) of this section.

(f) Upon receipt of a request submitted in accordance with paragraph (a) of this section, the Director will publish in the **Federal Register** a notice stating that the State management program under review will be available for inspection at the locations stated in the notice, and providing information on how copies may be obtained. The notice will also provide that written data, views, comments, or requests for an informal public hearing on the State management program may be submitted to the Director within the time specified in the notice.

(g) The Director shall approve the request for transfer of the management if, after consideration of the materials provided pursuant to this section and public comment received on such material, he determines that the State has developed and will implement a program for the conservation of the species that is consistent with the provisions, purposes, policies and goals of the Act, international treaty obligations and the regulations of this part.

(h) Notwithstanding the provisions of paragraph (g) of this section, the State may not exercise management authority, which is retained by the Director, until such time as the determinations required by § 18.54 of this part are final and implemented under State law, and, if a cooperative allocation agreement for the species is required under § 18.55(a) of this part, such agreement is implemented. At such time of final implementation, the Director shall publish in the **Federal Register** a notice transferring management of the species to the State.

§ 18.54 Determinations and hearings under Section 109(c)(2).

(a) *Introduction.* In order to gain approval of its marine mammal management program the State must provide for a process, consistent with Section 109(c)(2) of the Act, to determine the optimum sustainable population of the species and the maximum number of animals that may be taken from species it manages. The State process must be completed before the State may exercise any management authority over the subject marine mammals and it must include the elements set forth below.

(b) *Basis, purpose, and scope.* The process set forth in this section is applicable to and required for only the determinations of the OSP of the species and maximum number that may be taken without reducing it below its OSP and, in the case of Alaska if the species is below OSP, the maximum number of animals that may be taken, if any, for subsistence uses without preventing the species from increasing toward its OSP. The State need not allow the maximum take, as determined in accordance with this process, that is biologically permissible. The State may set and change regulations establishing bag limits, quotas, seasons, areas, manner of take, etc. within the maximum biologically permissible take pursuant to its other rulemaking criteria, authority, and procedures. Compliance with the process set forth in this section would not be required again unless the State proposes to modify its determinations of the status of the species with respect to its OSP or the maximum permissible take from that species.

(c) *Initial determinations by the State.* The State agency with management authority for the species of marine mammals shall make initial determinations on the basis of the best scientific evidence available of: (1) Whether or not it is at its OSP; (2) if so, the maximum number of that species that may be taken without reducing it below its OSP; and (3) if not, in the case of Alaska, the maximum number of animals that may be taken, if any, for subsistence uses without preventing the species from increasing toward its OSP.

(d) *Notice and review of initial determinations and request for hearing.* The State agency shall provide notice of its initial determinations to the Director and the public and shall provide access to or copies of the documentation supporting its determinations to the Director and the public. The State agency shall indicate in the notice of its initial determinations the location(s) and hours during which such documentation may be inspected and the costs, if any, of copies of such documentation. The State agency shall also indicate in the notice that any interested person may request a hearing regarding the initial determinations and shall provide a reasonable time to request the hearing of not less than 30 days after the notice, taking into account the time required to advise the public of the initial determinations and to make the supporting documentation readily available to interested persons for their consideration. If a request for a hearing is not made within the prescribed time period, the initial determinations shall be treated as final.

(e) *Notice of hearing.* If a request for a hearing is made within the prescribed time period by any interested person, the State agency shall provide notice of the hearing to the Director and the public not less than 30 days in advance of the scheduled date(s). The notice shall include the date(s), location(s), and purpose of the hearing, a recitation of the initial determinations, the name(s) of the person(s) who will preside at the hearing, and the manner and date by which interested persons must notify the State agency or presiding officer(s) of their desire to participate in the hearing. The State shall also make available and distribute upon request a list of witnesses and a description of the documentation and other evidence that will be relied upon by the State's witnesses in support of its initial determinations sufficiently in advance of the hearing date so as to allow interested persons to prepare questions and supporting or rebuttal testimony for the hearing.

(f) *Conduct of the hearing.* (1) The hearing shall be publicly conducted and reported verbatim by an official reporter.

(2) The State shall sponsor all written documentation in support of its initial

determinations with witnesses who are able, by virtue of training and experience, to respond fully to cross-examination regarding the facts and conclusions contained therein provided that, except by agreement of the parties, the State agency may not call any witnesses or introduce any documentation into the record unless the advance notice requirements of paragraph (e) of this section are met with respect to such witnesses or documentation.

(3) Any interested person who has notified the State agency of his desire to participate in the hearing pursuant to paragraph (e) of this section may participate in the hearing by presenting oral or written testimony or cross-examining witnesses of other parties with respect to matters relevant to the State's initial determinations, provided that any such written documentation must be sponsored by a witness who is able, by virtue of training and experience, to respond fully to cross-examination regarding the facts and conclusions contained therein.

(4) The presiding officer(s) shall conduct the hearing in accordance with such other rules of evidence, criteria, and procedures as are necessary and appropriate for the expeditious and effective determination of the issues. The presiding officer(s) may provide for oral argument and/or written briefs at the end of the hearing.

(5) Final determinations on the issues specified in paragraph (c) of this section must be supported by the best available scientific information so as to insure that any taking will be consistent with the maintenance of OSP.

(g) *Review of the hearing record and final determinations.* (1) The State agency may provide for either: (i) Review and evaluation of the hearing record by the presiding officer(s) and transmittal by the presiding officer(s) of recommended final determinations to the decision-maker(s) in the State agency; or (ii) review, and evaluation, of the hearing record, and final determinations by the presiding officer(s); or (iii) review and evaluation of the hearing record and final determinations by the State agency without benefit of any recommendations by the presiding officer(s). In any event, the final determinations by the State agency and/or the presiding officer(s) must be made solely on the basis of the record developed at the hearing. The State agency may not rely on oral or written evidence which was not presented at the hearing and made available to the parties for cross-examination and rebuttal testimony. Any such oral or written information transmitted to the presiding officer(s) or other members of the State agency responsible for the final determinations shall be treated as *ex parte* communications and may not be considered part of the record for decision.

(2) The State agency shall make final determinations of the issues set forth in paragraph (c) of this section and shall include in its statement of final determinations a statement of findings and conclusions and the reasons or basis therefor.

(3) The State agency shall advise the Director and the public of its final determinations and shall provide access to or copies of its decision document.

(h) *Judicial review.* The State agency's final determinations after a hearing must be supported by substantial evidence in the record of the hearing. Opportunity for judicial review of the State agency's final determinations must be available under State law. The scope of judicial review shall be equivalent to that provided for in 5 U.S.C. 706 (2) (A) through (E).

§ 18.55 State and Federal responsibilities after transfer of management authority.

(a) After determinations required by § 18.54 of this subpart have been made in respect to a species whose range extends beyond the territorial waters of the State, the State shall not exercise management authority until a cooperative agreement with the Secretary has been signed and implemented. The cooperative allocation agreement shall provide procedures for allocating, on a timely basis, the maximum amount of take as determined by the State pursuant to § 18.54 of this subpart. Such allocation shall give first priority to incidental take within the zone described in section 3(14) (B) of the Act as provided for under section 101(a) of the Act, except that in the case of Alaska, first priority shall be given to subsistence use.

(b) For those species to which paragraph (a) of this section applies, the State may request the Director to regulate the taking of the species within the zone described in section 3(14) (B) of the Act for subsistence uses and/or hunting in a manner consistent with the regulation by the State of such taking within the State. If such a request is made, the Director shall adopt and enforce within such zone, such of the State's regulatory provisions as the Director considers to be consistent with the administration within such zone of section 101(a) of the Act.

(c) If management authority for a species has been returned to a State pursuant to this subpart, the Director shall provide to the State an opportunity to review all requests for permits to remove live animals from habitat within the State for scientific research or public display purposes. If the State finds that issuance of the permit would not be consistent with its management program for the species:

(1) The State shall so inform the Director within 30 days of its receipt of the application and the Director shall not issue the permit; and

(2) The Director shall provide to the permit applicant and the State an opportunity to adjust the permit application or otherwise reconcile it with the State management program for the species.

(d) After management of a species has been returned to the State, State and Federal authorities shall cooperate to the maximum extent practiable in conserving the species of marine mammals.

§ 18.56 Monitoring and review of State management program.

(a) The Director has responsibility to monitor and review all State management programs approved pursuant to this subpart.

(b) In order to facilitate such review, each State to which management authority has been returned shall submit an annual report not later than 120 days after the close of such State's first full fiscal or calendar year following the effective date of the Director's approval of the State management program, and at the same time each following year, or at such other time as may be agreed upon. The report shall contain the following information current for each reporting period:

(1) Any changes in the State laws or regulations which comprise those aspects of the State management program submitted pursuant to § 18.53(b), and, in the case of Alaska, § 18.53(d), of this subpart;

(2) Pertinent new data on the marine mammal species or the marine ecosystems in question including a summary of the status, trend and general health of the species;

(3) A summary of available information relating to takings under the State management program;

(4) A summary of State actions to protect the species' habitat;

(5) A summary of all State research activity on the species;

(6) Any significant changes in the information provided with the original request for transfer of management authority;

(7) A summary of all enforcement activity;

(8) A summary of present budget and staffing for the marine mammal activities in the categories of research, management and enforcement;

(9) Any other information which the Director may request, or which the State deems necessary or advisable to facilitate review by the Director of State management of the species.

(c) Each State having an approved management program shall file a report whenever any of the following occurs:

(1) Any change in a relevant State law or regulation (amendments, repealers, or new legislation or regulations) as submitted pursuant to paragraphs (b)(2) through (b)(5), and, in the case of Alaska, paragraph (d)(1), of § 18.53 of this subpart that may impair the State's ability to implement the program;

(2) Any significant natural or manmade occurrence or any new scientific information that may warrant reconsideration of the determinations made pursuant to § 18.54 of this subpart.

(d) All components of the State request for return of management authority, as well as annual reports submitted under paragraph (b) of this section and reports submitted under paragraph (c) of this section, shall be available for inspection and copying at the Division of Wildlife Management, U.S. Fish and Wildlife Service, Washington, D.C. 20240.

§ 18.57 Revocation and return of State management.

(a) Revocation of management. The Director has the responsibility to review management of a species returned to a State under this subpart and to determine whether or not the State management program continues to comply with the requirements of the Act, this subpart and the State's request for return of management authority as submitted pursuant to § 18.53 of this subpart.

(1) Upon receipt of any substantial factual information suggesting that the State management program is not being implemented or is being implemented in a manner inconsistent with the Act, this subpart, or the State's request for return of management authority, the Director shall, as soon as practicable, determine whether or not the State continues to comply with the requirements of the Act, this subpart and the State's request for return of management authority.

(2) Whenever pursuant to a review as specified in paragraph (a)(1) of this section, the Director determines, that any substantial aspect of the State management program is not in compliance with the requirements of the Act, this subpart or the State's request for return of management authority, he shall provide written notice to the State of his intent to revoke management authority, together with a statement, in detail, of those actions or failures to act upon which such intent to revoke is based. The Director shall publish notice of such intent to revoke in the **Federal Register** and shall conduct an informal public hearing on the matter if requested by the State or if he otherwise determines it to be necessary, and he shall provide to the State an opportunity for consultation between him and the State concerning such actions or failures and necessary remedial actions to be taken by the State.

(3) If within 90 days after notice is provided under subparagraph (a)(2) of this section, the State has not taken such remedial measures as are necessary, in the judgment of the Director, to bring the State management program into compliance with the provisions of the Act, this subpart and the State's request for return of management authority, the Director shall revoke the transfer of management authority by written notice to the State and publication in the **Federal Register.**

(b) Voluntary return of management authority to the Director.

(1) If a State desires to return management of a species of marine mammals to the Director it shall provide to the Director notice of intent to return managment. The Director shall accept the return of mangement, and such return shall become effective, upon publication of a notice in the **Federal Register** to this effect no sooner than 30 days (except in an emergency as determined by the Director) nor longer than 60 days after the State has provided notice of intent to return managment.

(2) If implementation of any aspect of the State management program is enjoined by court order, the State shall advise the Director of such injunction and its effect on the State management program. If the State determines that the effect of the injunction is to preclude effective conservation of the species under the terms of the State management program, it shall so notify the Director and such notification shall be treated as a notice of intent to return management as provided in paragraph (b)(1) of this section. If the State determines that the injunction does not preclude effective conservation of marine mammals under the terms of the State management program, it shall so notify the Director together with the bases for the State's determination and such notice will be treated as a report submitted pursuant to the terms of § 18.56(c)(1) of this part. In either case, the State shall provide notice to the Director as soon as practicable but not more than 30 days after issuance of the injunction.

(c) When revocation of a management authority pursuant to paragraph (a) of this section becomes final, or when a State returns management pursuant to paragraph (b) of this section, the Director shall resume such management authority and regulate the taking and provide for the conservation of the species within the State in accordance with the provisions of the Act and the regulations of this part.

§ 18.58 List of States to which management has been transferred.

The following States have received management authority pursuant to this part for the species listed: [Reserved].

(16 U.S.C. 1361 et seq., as amended by Pub. L. 97-58)

G. Ray Arnett,

Assistant Secretary for Fish and Wildlife and Parks.

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