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Trudy E. Cordora

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Comments

Regulating a Growing Whale-Watching Industry: How Effective is the Marine Mammal Protection Act?

Trudy E. Cordora*

I. Introduction

The vast mysterious underwater world and its inhabitants hold a particular fascination for many people. This curiosity combined with the thrill of watching animals in their natural environment has given rise to a rapidly growing eco-tourist industry which includes many types of animal watches, especially involving dolphins and whales. Of all the animals in the sea that we can study, whales are a particularly interesting species because of their agility, size and unique characteristics. Because of our natural curiosity, however, whales are in need of protection.

The whale-watching industry is a large and growing industry that exists so that paying spectators can observe whales in their natural habitat. The success of the whale-watching industry is a direct result of

* J.D. Candidate, The Dickinson School of Law of The Pennsylvania State University (2006); B.A. Political Science, *summa cum laude*, King's College (2002). The author wishes to thank her mother for her constant love and support; Judy Plummer and Stephanie Bressler for their inspiration; and Chuck Fehlinger for making everything worth while.

the human desire to observe these unique creatures in their natural habitat at close range. Although it is a thrilling and unforgettable experience to observe whales in their natural habitat, our fascination has created a potentially harmful situation wherein whales now require protection from the dangers associated with whale-watching excursions. The Marine Mammal Protection Act,¹ and in certain instances, the Endangered Species Act,² both serve to regulate the whale-watching industry in an attempt to preserve whales and their natural habitat. This comment suggests that the Marine Mammal Protection Act should be interpreted more broadly to effectively protect the health and sustainability of whales.

II. Whale-Watching Industry

The whale-watching industry is a vast and continually growing enterprise with current figures estimating it to be a one billion dollar industry that operates in more than eighty-seven countries worldwide.³ Whale-watching expenditures have grown from nearly \$504 million in 1994 to over \$1 billion in 1998 and they continue to increase.⁴ Likewise, the number of whale watchers has grown from four million in 1991 to an estimated nine million in 1998.⁵

In many communities, whale-watching provides valuable income through the creation of new jobs and businesses.⁶ In addition to the economic opportunities associated with the whale-watching industry, whale-watching can help to foster an appreciation of the importance of marine conservation, provide opportunities for scientific research and can offer communities a sense of identity and pride.⁷

1. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h (1996).

2. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988).

3. Hoyt, E. 2001. *Whale Watching 2001: Worldwide tourism numbers, expenditures and expanding socio-economic benefits* [hereinafter Hoyt Report]. International Fund for Animal Welfare, Yarmouth Port, MA, USA, pp. i-vi; 1-158, 17. This report has been endorsed by the United Nations Environment Programme (UNEP).

4. *Id.* at 9.

5. *Id.*

6. *Id.*

7. *Id.* As further documentation of the increasing popularity of whale-watching, the Hoyt Report concludes that it is practiced in some 492 communities around the world, nearly 200 more communities than in 1994. The report persuasively suggests that whale-watching is often an important source of valuable, sometimes critical income to host communities with the creation of new jobs and businesses. The report concludes that whale-watching activities help to foster an appreciation of the importance of marine conservation and provide opportunities for researchers wanting to study marine life. A unique notion proposed by this report suggests that whale-watching provides communities with a sense of identity and considerable pride.

III. How Does Whale-Watching Affect Whales?

The effects that whale-watching has on the whale population are much less predictable than the usually positive effects that whale-watching has on communities.⁸ The killer whale (*Orcinus orca*) provides a good example of the potentially negative effects that whale-watching might have on whale populations.⁹

A. *Zoological Society of London Study*

In British Columbia, many people are concerned that the killer whale is receiving too much attention from whale-watchers.¹⁰ Perhaps people are so enthusiastic about observing killer whales in their natural habitat because captive killer whales are frequently showcased in popular films and at popular aquatic amusement parks.

The Zoological Society of London conducted a study to determine whether a vessel following whale-watching guidelines would affect the behavior of killer whales in Johnstone Strait, British Columbia, Canada.¹¹ The study revealed that a whale might respond to whale-watching boats by varying the duration of its dives, a reaction commonly referred to as vertical avoidance, or conversely, by swimming faster or altering the direction of swimming, a reaction commonly referred to as horizontal avoidance.¹² Vertical avoidance, as noted by Zoological Society researchers, is only a successful avoidance technique if the whale is able to hold its breath longer than the attention span of the whale-watcher.¹³ In addition to avoidance techniques, whales might also display antagonistic behaviors like slapping their flukes or pectoral fins on the surface of the water when being observed by a whale-watching vessel.¹⁴

The Zoological Society of London study produced several main conclusions based on the correlation between whale behavior and vessel proximity.¹⁵ One conclusion reached by the researchers is that

8. E-mail from Erich Hoyt, Author and Research Scientist, to Cheryl Jones, United Kingdom (Apr. 9, 2003, 03:04 PM), available at <http://whale.wheelock.edu/archives/ask03/0131.html>.

9. Rob Williams, Andrew W. Trites and David E. Bain, *Behavioral Responses of Killer Whales (*Orcinus orca*) to Whale-Watching Boats: Opportunistic Observations and Experimental Approaches*, J. ZOOLOGY 255, 255-70 (2002) (discussing the potentially negative effects that whale-watching might have on whale populations).

10. *Id.*

11. *Id.* at 256.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

weakening whale-watching guidelines or not enforcing them would result in higher levels of disturbance to whales.¹⁶ One possible explanation for the researcher's conclusion is that vessel operators might be more likely to engage in behavior that is potentially injurious to whales if they are not restricted by guidelines like those currently in place. The overarching conclusion of the study is that the demonstrated economic and conservation value of whale-watching must not be allowed to come at the price of excessive stress to individual whales or their populations.¹⁷

B. New Zealand Department of Conservation Study

Another example of the effects that whale-watching might have on whales is illustrated by the study of sperm whales.¹⁸ Off the coast of Kaikoura, South Island, New Zealand, sperm whales (*Physeter macrocephalus*) are the subject of a zealous whale-watching industry that uses both boats and aircraft to view the mammals year-round.¹⁹ The New Zealand Department of Conservation²⁰ conducted a study using both boat and shore based observations to determine what impacts, if any, current whale-watching activities have on sperm whales.²¹

Over a four-year period from 1998 to 2001, researchers recorded 1,676 sightings from their research vessel and 435 from the shore.²² Researchers documented significant variations in several aspects of the whale's behavior caused by the presence of whale-watching vessels.²³ First, the study showed that the whales blow interval decreased in the presence of the research vessel and whale-watching boats.²⁴ Second, the study showed that whale-watching boats and aircraft caused increases in

16. *Id.*

17. *Id.* at 255.

18. C.F. Richter, S.M. Dawson, E. Slooten, *Sperm Whale-Watching Off Kaikoura, New Zealand: Effects of Current Activities on Surfacing and Vocalization Patterns*, SCIENCE FOR CONSERVATION 219 (2003) (discussing the potential effects that whale-watching has on sperm whales off the coast of Kaikoura, South Island, New Zealand).

19. *Id.*

20. The New Zealand Department of Conservation is the central government organization charged with conserving the natural and historic heritage of New Zealand on behalf of and for the benefit of present and future New Zealanders. Its mission is to conserve New Zealand's natural and historic heritage for all to enjoy now and in the future. As a government department, the Department is subject to laws passed by Parliament. The Department was formed in 1987 with the passing of the Conservation Act which sought to combine conservation and management functions. The Conservation Act sets out most of the Department's responsibilities. Conservation Act, <http://www.doc.govt.nz/about-doc/index.asp> (last visited on Jan. 22, 2006).

21. Richter et al., *supra* note 18, at 5.

22. *Id.*

23. *Id.*

24. *Id.*

the time whales spent at the surface of the water.²⁵

The New Zealand Department of Conservation study distinguished between the effects that whale-watching has on “resident whales,” which typically stay in the study area for weeks or months at a time, and “transients,” which are seen on one day only.²⁶ The researchers concluded that transients, who are rarely visited by whale-watching trips because of their further offshore distribution, reacted more frequently and more strongly to boats, while residents, who received most of the whale-watching activity, reacted less.²⁷ This observation seems reasonable, but is somewhat disconcerting since it tends to suggest that whales that are frequently observed by whale-watching or other vessels become desensitized to human observation. Such desensitization might serve to encourage whales to seek out human interaction thereby creating potentially harmful situations for both the whale and its human observers.

The New Zealand study revealed that whale reactions to whale-watching boats varied significantly among different individuals. According to the study, some whales were very tolerant while others demonstrated “markedly altered behavior in response to the water craft.”²⁸ Whale reactions also varied with season.²⁹

Although the study found whale-watching to have several statistically detectable effects on whales, the effects appear to be of “no serious biological consequence.”³⁰ While it might be cause for concern that some individual whales may spend approximately half of their surfacings during the busy summer season accompanied by one or more boats, given management options of reducing, maintaining or increasing the level of permitted whale-watching activities, the New Zealand Department of Conservation researchers recommended that the current level be maintained.³¹ The researchers further concluded that the current rules governing the number of vessels and their conduct around whales appear to be generally effective in minimizing harassment of whales by commercial whale-watching vessels.³²

Despite the New Zealand Department of Conservation’s final recommendation that current levels of whale-watching activities be maintained since the detectable effects appear to have no serious

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 71.

biological consequence on the whale population, the researchers note that it is possible for whales to continue normal behavior despite the presence of whale-watching vessels and that such tolerance should not be interpreted as lack of impact.³³ Although the New Zealand Department of Conservation's conclusion suggests that current whale-watching levels can be maintained without causing significant disturbance to the whale population, it is important to note that the Department recognizes that whales will endure some biologically significant disturbances if the particular activity or location with which whale-watching vessels are interfering is important to their existence.³⁴

C. International Fund for Animal Welfare Report

A report produced through a workshop sponsored by the International Fund for Animal Welfare³⁵ on the legal aspects of whale-watching concluded that if whales are harassed, feeding may be disrupted, anxiety may be caused, and if mating is disturbed, conception may not occur.³⁶ The International Fund for Animal Welfare workshop report concludes that the human attention associated with whale-watching can produce marked effects in whale populations including short term effects like changes in behavior, medium term effects like changes in distribution and migratory routes, and long term effects like changes in reproductive success.³⁷

It is appropriate to note that researching the potential effects that whale-watching might have on whale behavior places researchers in a seemingly precarious situation. It might be called a necessary evil that in

33. *Id.* at 9.

34. *Id.*

35. International Fund for Animal Welfare headquarters has been located on Cape Cod, Massachusetts since 1977. They currently boast more than 1.8 million supporters worldwide. They currently are operating campaigns that promote whale conservation and whale watching tourism. According to its mission statement, International Fund for Animal Welfare works with governments and the tourist industry to analyze the regional potential for whale-watching, to develop responsible whale-watching regulations, to produce and distribute educational materials on whales, and to coordinate research protocols and projects associated with whale-watching. International Fund for Animal Welfare conducts an extensive program of seminars, operator-training workshops and information-exchange meetings to promote the whale-watching industry and ensure minimal disturbance to whales. In promoting whale-watching, International Fund for Animal Welfare recognizes the need to ensure that whale-watch operations are carried out responsibly so that the joy of sighting a whale is preserved, even enhanced, while neither individual animals or their populations are unduly stressed, <http://www.ifaw.org> (last visited on Jan. 22, 2006).

36. Mark J. Spalding, J.D., M.P.I.A. and Jared E. Blumenfeld, LL.B, LL.M, "Workshop on the Legal Aspects of Whale-Watching, Punta Arenas, Chile (Nov. 17-20, 1997).

37. *Id.*

order to observe the potential affects that whale-watching has on whale populations, researchers have to place themselves in a similar position of observation and might themselves unwittingly disrupt whale behavior.

D. Promoting Safe Observation of Whales

Whale-watch vessel operators pride themselves on finding whales where they congregate, leading to increased potential for whales to be harassed, injured or even killed.³⁸ It is logical that whale-watch vessel operators seek out whales traveling individually or in groups since they are paid to ensure that their passengers get the chance to observe whales. The possibility exists that intentionally pursuing a marine mammal by water craft will lead to an increased risk of colliding with the mammal or disrupting its course of behavior.

The National Marine Fisheries Service,³⁹ a U.S. government agency, has received complaints from members of the public who have witnessed the harassment of whales or other harm inflicted by whale-watching vessels.⁴⁰ For example, in 1998, the National Marine Fisheries Service received a report that whale-watch vessels struck two whales while returning to their homeport.⁴¹ In 1999, the National Marine Fisheries Service also received three reports of whales being harassed.⁴² It is undoubtedly a serious matter when whale-watching vessels strike whales, but no less serious is the harm caused when such vessels or their passengers affect whales in less direct ways, such as seemingly innocent forms of harassment.

Although the New Zealand Department of Conservation believes that whales can be effectively protected if current legal levels of whale-watching are maintained, they also recognize the dangers that whales face when vessel operators act irresponsibly.⁴³ For example, the previously discussed New Zealand Department of Conservation study that focused on sperm whales found that fast and erratically moving boats appear to be more disruptive than vessels that approach whales

38. North Atlantic Whale Protection, 65 Fed. Reg. 270 (Jan. 4, 2000) (to be codified at 50 C.F.R. pts. 216 and 222).

39. National Marine Fisheries Service is dedicated to the stewardship of living marine resources through science-based conservation and management, and the promotion of healthy ecosystems. As a steward National Marine Fisheries Service protects, and manages living marine resources in a way that ensures their continuation as functioning components of marine ecosystems, affords economic opportunities, and enhances the quality of life for the American public, <http://www.nmfs.noaa.gov/> (last visited on Jan. 22, 2006).

40. *Id.*

41. *Id.*

42. *Id.*

43. Richter et al., *supra* note 18, at 10.

slowly and with few directional changes.⁴⁴ The study found that the risk posed to whales by water craft increases in proportion to the number of boats in the area and the speed at which they travel.⁴⁵

E. Swimming with Dolphins: Another Example of the Human Desire to Interact with Marine Life

A parallel might be drawn between whale-watching and encounters where humans observe or swim with dolphins. Dolphin encounters, which like whale-watching activities are also growing in popularity, entail close personal encounters between humans and captive or wild dolphins. A very popular destination for people who want to observe or swim with dolphins is Dolphin Encounters on Blue Lagoon Island in the Bahamas.⁴⁶ Dolphin Encounters began in 1989 when two bottlenose dolphins from a failing aquarium in Nassau, Bahamas were rescued to be relocated to a larger seawater dolphin habitat.⁴⁷ Dolphin Encounters' main objective is "to let guests interactively experience dolphins to heighten their awareness and understanding of these truly magnificent animals and similar species."⁴⁸ Although the distinct difference between an encounter with a captive dolphin and a whale in the wild is clear, that being the difference between interacting with the animal in the wild versus captivity, the human desire to interact with unique and intelligent marine life is a common element of both experiences.

In its effort to educate the public about marine life and encounters between humans and marine mammals, Dolphin Encounters promotes the guidelines set forth in the Marine Mammal Protection Act and its Bahamian counterpart, the Wild Animals Protection Act.⁴⁹

F. Common Guidelines for Safe Observation of Marine Life

The National Watchable Wildlife Program, promoted by an informal group of wildlife experts, along with the Alliance of Marine Mammal Parks and Aquariums developed viewing tips to help humans have more fulfilling experiences when viewing marine life both in captivity and in the wild, and to help protect marine life from the dangers posed when humans attempt to engage them.⁵⁰ A few notable examples

44. *Id.*

45. *Id.* at 70.

46. Dolphin Encounters, <http://www.dolphinencounters.com> (last visited on Jan. 22, 2006).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

of the viewing tips that are similar to some of the key provisions of the Marine Mammal Protection Act including suggestions to

keep a safe and respectable distance from the animals and to use binoculars or other apparatus to garner a more focused view, 100 yards is suggested; avoid excessive boat speed or abrupt changes in speed or direction; limit time spent observing animals since encounters with people can be stressful to animals and can alter their normal behaviors, one half hour is suggested; never surround an animal so that it has no means of voluntary escape; and, finally, do not feed wild animals or captive animals who are under professional care.⁵¹

The National Watchable Wildlife Program guidelines seem reasonable and appear to directly support the primary goal of promoting the passive observation of wild or captive animals from a distance for the safety of both the animals and their human observers.⁵²

IV. Marine Mammal Protection Act

The Marine Mammal Protection Act⁵³ was enacted in 1972 in recognition of the fact that certain marine species were in danger of extinction or depletion as a result of human activity.⁵⁴ The purpose of the Marine Mammal Protection Act is to protect and maintain the health and stability of the marine ecosystem.⁵⁵ More specifically, Congress stated that “marine species should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part.”⁵⁶ Consistent with this major objective, Congress promulgated that marine species, including whales, should not be permitted to diminish below their optimum sustainable population.⁵⁷

Although the Marine Mammal Protection Act clearly states its overall objective,⁵⁸ several of the Act’s key provisions include potentially ambiguous terms that might make it difficult to interpret the statute in furtherance of its overall objective. For example, the Marine Mammal Protection Act protects marine mammals from being harassed.⁵⁹ The term “harass” has been narrowly interpreted within the

51. *Id.*

52. *Id.*

53. 16 U.S.C. §§ 1361-1421h (1996).

54. *Id.* at § 1361(1).

55. *Id.* at § 1361(6).

56. *Id.* at § 1361(2).

57. *Id.*

58. *Id.* at § 1361(6).

59. *Id.* at § 1372(a)(1).

context of the Marine Mammal Protection Act to mean “a direct and intrusive action.”⁶⁰ This narrow interpretation of the term “harass” and a similarly narrow interpretation of the overarching term “take” within the context of the Marine Mammal Protection Act will later be compared to the Supreme Court decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*⁶¹ where these terms are interpreted within the context of the Endangered Species Act.

There is not one all-encompassing set of regulations for whale-watching since the same regulations would not necessarily be appropriate for every species of whale in all areas.⁶² The Marine Mammal Protection Act works to protect marine life in conjunction with other laws such as the Endangered Species Act.⁶³ All marine mammals are protected under the Marine Mammal Protection Act and some also receive protection under the Endangered Species Act if they are listed as threatened or endangered.⁶⁴ The Endangered Species Act provides for the conservation of species that are endangered or threatened with extinction.⁶⁵ The National Marine Fisheries Service and the U.S. Fish and Wildlife Service share responsibility for implementing the Endangered Species Act.⁶⁶ The National Marine Fisheries Service typically manages ocean species while the U.S. Fish and Wildlife Service oversees land and freshwater species.⁶⁷

Both the Marine Mammal Protection Act and the Endangered Species Act make it generally illegal to “take” marine mammals or endangered species; it may also be illegal to “take” threatened species

60. *United States v. Hayashi*, 22 F.3d 859, 865 (9th Cir. 1992).

61. 515 U.S. 687 (1995).

62. Whale and Dolphin Conservation Society, *Whale Watching Regulations*, <http://www.wdcs.org/dan/publishing.nsf/allweb/E2A02F98126FCEFF80256FD900330804> (last visited Jan. 22, 2006).

63. 16 U.S.C. §§ 1531-1544 (1988).

64. National Marine Fisheries Service (NOAA Fisheries), <http://www.nmfs.noaa.gov/pr/laws/esa.htm> (last visited on Jan. 22, 2006).

65. *Id.*

66. *Id.*

67. *Id.* National Marine Fisheries Service (NOAA Fisheries) is the federal agency, a division of the Department of Commerce, responsible for the protection and stewardship of all the living marine resources in the United States and their habitat. As a federal agency, opinions formed by the National Marine Fisheries Service pertaining to marine law can carry significant weight. NOAA Fisheries is responsible for “the management, conservation and protection of living marine resources within the United States’ Exclusive Economic Zone (water three to 200 mile offshore).” NOAA Fisheries “assesses and predicts the status of fish stocks, ensures compliance with fisheries regulations and works to reduce wasteful fishing practices.” Pursuant to the Marine Mammal Protection Act and the Endangered Species Act, NOAA Fisheries “recovers protected marine species (i.e. whales, turtles) without unnecessarily impeding economic and recreational opportunities.”

under the Endangered Species Act.⁶⁸ The Marine Mammal Protection Act and the Endangered Species Act define the term “take” in somewhat different ways. Under the Endangered Species Act, “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.⁶⁹ Under the Marine Mammal Protection Act, “take” means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill.⁷⁰

The slight difference in the way that the Marine Mammal Protection Act and the Endangered Species Act define terms like “take” might lead to inconsistent application of the two laws. For example, the Marine Mammal Protection Act and the Endangered Species Act both define the term “take” to mean to harass, hunt, capture, or kill, but the Endangered Species Act is broader and goes on to also define the term to mean to shoot, wound, pursue or collect.⁷¹

V. Regulating the Practice of Whale-Watching Through the Marine Mammal Protection Act

The legal aspects of whale-watching vary according to species and jurisdiction, but generally all of the relevant laws, regulations and guidelines seek to avoid instances of threatening orientations of approach, rapid approaches, disturbing noises, or any sudden changes in noise or direction of the whale-watching platform.⁷²

The Marine Mammal Protection Act makes it unlawful for “any person or vessel subject to the jurisdiction of the United States to take any marine mammal on the high seas.”⁷³ A person “takes” a marine mammal in violation of the Marine Mammal Protection Act if they do or attempt to harass, hunt, capture or kill the mammal.⁷⁴ The Marine Mammal Protection Act defines “harassment” as “any act of pursuit, torment or annoyance that either has the potential to injure a marine mammal or has the potential to disturb a marine mammal by disrupting its behavioral patterns including, for example, migration, breathing, nursing, breeding, feeding, or sheltering.”⁷⁵ Since whale-watch vessels seek to find whales where they congregate and when they are successful in locating the creatures they move in pursuit of viewing them, it seems that whale-watching in general might violate the spirit of the Marine Mammal Protection Act. However, the Marine Mammal Protection Act

68. *Id.*

69. 16 U.S.C. § 1531 (1988).

70. 16 U.S.C. § 1361 (1996).

71. 16 U.S.C. § 1362(13) (1996); 16 U.S.C. § 1531 (1988).

72. Spalding et al., *supra* note 36, at 3-9.

73. 16 U.S.C. § 1372(a)(1) (1996).

74. 16 U.S.C. § 1362(13) (1996).

75. 16 U.S.C. § 1362(18)(A)(i)(ii) (1996).

has been narrowly interpreted in ways that seek to protect whales while allowing humans to enjoy viewing them as well.

In *U.S. v. Hayashi*,⁷⁶ the Ninth Circuit held that shooting a gun into U.S. waters to deter a porpoise from touching a boaters fishing line did not constitute a taking under the Marine Mammal Protection Act.⁷⁷ Based on this narrow interpretation of take, it seems that the mere observation of marine mammals from a vessel without overtly attempting to make contact with them would not constitute a taking under the Marine Mammal Protection Act. However, this is not completely clear since a whale watch vessel might attempt to approach and observe a whale while the animal is breeding or feeding, which would be a clearer violation of the Marine Mammal Protection Act.⁷⁸

In *Hayashi*, the court embarked on an exercise in statutory interpretation by examining the terms “take” and “harass” within the context of the Marine Mammal Protection Act.⁷⁹ In defining the term “take,” the court highlighted the grouping of the term “harass” with the words “hunt,” “capture,” and “kill,” all of which involve “direct and significant intrusions upon the normal life-sustaining activities of a marine mammal.”⁸⁰ Thus, the court found it reasonable and consistent to interpret the term “harass” within the same general specter of the words around it,⁸¹ so as a result, for harassment to constitute a taking under the Marine Mammal Protection Act, it must entail a similar level of intrusion.⁸²

The Marine Mammal Protection Act does not provide permits to view or interact with marine mammals in their natural habitat, except for specifically listed purposes like scientific research.⁸³ Thus, to be in accordance with the Marine Mammal Protection Act, any interaction with wild marine life must be conducted in a manner that does not harass the animals.⁸⁴ The National Marine Fisheries Service, for example, strongly recommends against any effort to closely approach, interact

76. *United States v. Hayashi*, 22 F.3d 859, 859-61 (9th Cir. 1992). David Hayashi was convicted of taking a marine mammal in violation of 16 U.S.C. § 1372(a)(2)(A) for firing a rifle into water behind porpoises to divert them from his fishing lines. The Ninth Circuit held that the Marine Mammal Protection Act did not make it a crime to take reasonable steps to deter porpoises from eating fish or bait off a fisherman’s line and accordingly reversed David Hayashi’s conviction.

77. *Id.* at 864.

78. 16 U.S.C. § 1362(18)(A)(i)(ii) (1996).

79. *Hayashi*, 22 F.3d at 865.

80. *Id.*

81. *Id.*

82. *Id.*

83. National Marine Fisheries Service, Office of Protected Resources, <http://www.nmfs.noaa.gov/pr/laws/mmpa.htm> (last visited on Jan. 22, 2006).

84. *Id.*

with, or attempt to interact with whales in the wild.⁸⁵ The National Marine Fisheries Service further states that such prohibited interaction includes “attempting to swim with, pet, touch, or elicit a reaction from the animals.”⁸⁶ Although *Hayashi* suggests that a higher level of intrusion is required for an activity to be considered harassment, the National Marine Fisheries Service seems to contradict that interpretation of the Marine Mammal Protection Act by suggesting that even the minimal intrusion that can result from attempting to elicit a response from wild marine life can be considered harassment under the Marine Mammal Protection Act.⁸⁷

The National Marine Fisheries Service whale-watching guidelines for the Northeast region detail procedures that vessel operators should follow when in the presence of whales.⁸⁸ When a vessel operator comes within 600 yards to two miles of a whale, they are advised to reduce speed, avoid sudden changes in direction, and to post a dedicated lookout to assist the vessel operator in monitoring the location of all marine mammals.⁸⁹ Vessel operators must comply with “close approach” procedures upon coming within 600 feet of a whale.⁹⁰ Close approach procedures advise vessel operators to “avoid attempting to approach whales head-on, to not approach or leave whales at any more than idle or no-wake speed and to stay to the side or behind the whales so they do not box in the whales or cut off their path.”⁹¹ Once within the close approach zone of 100 to 300 feet from a whale there is a one vessel limit and if there is more than one vessel, the vessel within 300 feet should limit its time to fifteen minutes in close approach to any whale.⁹² If a whale approaches a vessel within 100 feet, vessel operators are advised to put engines in neutral and to “re-engage propulsion only when the whale can be observed clear of harm’s way from the vessel.”⁹³ In order to fully protect whales from the harm that can be caused if they were to collide with a vessel, vessel operators are advised to cease whale-watching and to return to port fifteen minutes before sunset so that their ability to see and maintain a safe distance from whales is not impaired by

85. *Id.*

86. *Id.*

87. *Id.*

88. National Marine Fisheries Service, Whale-Watching Guidelines for the Northeast Region, <http://www.nero.noaa.gov/shipstrike/info/guidetxt.htm> (last visited on Jan. 22, 2006).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

the lack of sunlight.⁹⁴

To ensure compliance with the National Marine Fisheries Service regulations and other laws that are in place to protect wildlife, the National Marine Fisheries Service reminds vessel operators that “a violation of the Marine Mammal Protection Act or the Endangered Species Act may result in fines or civil penalties of up to \$10,000 or criminal penalties of up to \$20,000 plus imprisonment and/or seizure of vessel and other personal property.”⁹⁵

Whale-watching vessels must take care to follow laws like the Marine Mammal Protection Act and the Endangered Species Act, and regulations like those set out by the National Marine Fisheries Service so that whales and other marine mammals are protected from the dangers associated with water craft.

VI. The Marine Mammal Protection Act and the Endangered Species Act: A Point of Comparison

It is useful to compare *Hayashi*,⁹⁶ which interpreted the terms “take” and “harass” within the context of the Marine Mammal Protection Act to the U.S. Supreme Court case *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,⁹⁷ which interpreted those terms within the context of the Endangered Species Act of 1973.⁹⁸ The Endangered Species Act makes it unlawful for any person to “take” endangered or threatened species⁹⁹ and defines “take” to mean to “harass, harm, pursue, wound or kill.”¹⁰⁰ The Secretary of the Interior further defines “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife.”¹⁰¹ In accordance with the Secretary’s definition of “harm,” in *Sweet Home*, the Supreme Court also interpreted the Endangered Species Act section 9 prohibition against harm to include “significant habitat modification or degradation where it actually kills or injures wildlife.”¹⁰²

Based on the text of the Endangered Species Act, the Court found the Secretary’s interpretation of the term “harm” to be reasonable for

94. *Id.*

95. *Id.*

96. *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1992).

97. 515 U.S. 687 (1995).

98. 16 U.S.C. §§ 1531-1544 (1988).

99. *Id.* at § 9(a)(1)(B).

100. *Id.* at § 3(19).

101. United States Fish and Wildlife Service, Department of the Interior: Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation and Importation of Wildlife and Plants, 50 C.F.R. § 17.3 (Jan. 19, 2005).

102. *Sweet Home*, 515 U.S. at 687.

three main reasons.¹⁰³ First, the ordinary understanding of “harm” is most reasonably construed to include habitat modification that results in actual injury or death to the protected animal.¹⁰⁴ The Court further explained that unless “harm” is interpreted broadly to include indirect injuries, the word will have no meaning that does not duplicate the meaning of other words that section 3 uses to define “take.”¹⁰⁵ Second, the Endangered Species Act is written with the broad purpose of “providing comprehensive protection for endangered and threatened species” and thus terms within the statute should be construed broadly to achieve this result.¹⁰⁶ Finally, the fact that a party must apply for a permit to take an animal incident to an otherwise lawful activity suggests that Congress understood section 9 to prohibit indirect as well as direct takings.¹⁰⁷

Based on *Sweet Home*, it might be argued that the Marine Mammal Protection Act should be interpreted broadly like the Endangered Species Act to provide greater protection for marine wildlife. For example, if “harm” within the context of the Marine Mammal Protection Act was interpreted to require the minimal level of intrusion that “harm” requires within the context of the Endangered Species Act, whales and other marine mammals might be better protected since individuals would not be permitted to significantly modify or interfere their habitat without violating the law. If this broader interpretation were adopted, it would seem reasonable to suggest that seemingly minimal, but nonetheless intrusive, human activities like trying to elicit a response from a protected marine animal would be considered harassment under the Marine Mammal Protection Act.

VII. Conclusion

The whale-watching industry is strong and will in all likelihood continue to grow. Human interest in nature will help the whale-watching industry and other eco-tourist industries like it to continue to thrive. While it is favorable that humans take an interest in the natural world around them, such attention might put whales and other wild animals being observed at a greater risk for injury due to the more frequent entry of humans into their natural habitat.

Although humans may have the very best of intentions in seeking out these intriguing creatures, we must be careful not to let our quest for

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 687-88.

pleasure and adventure disrupt the whale's behavioral patterns to the extent that we do harm to them in the process. Whales are well served when human beings feel a special enough connection to them to become personally involved in the effort to protect them, and such a connection might well develop after a human has the pleasure of observing a whale in its natural habitat, but whales can be harmed if people attempt to form too close a relationship with them since they are, after all, wild creatures that must be allowed to retain their sense of separateness from the human world if they are to continue to survive in the wild.

The Marine Mammal Protection Act and other laws such as the Endangered Species Act serve to protect marine life, but narrow interpretation of these laws might do a disservice to the creatures they are intended to protect.

The whale-watching industry and its patrons have a special responsibility to act with care when exploring whales and other marine animals in their natural habitat. By acting to protect whales and all forms of animal life today, we will help to secure a much needed and well deserved place for them in our future.