DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

RIN 1018–AT48

Marine Mammals; Native Exemptions

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the Fish and Wildlife Service (Service), amend regulations implementing the Marine Mammal Protection Act of 1972 (MMPA), as amended. This action revises our existing definition of ''authentic native articles of handicrafts and clothing'' to reflect a December 28, 1992, Court ruling, which found that our regulation defining ''authentic native articles of handicrafts and clothing'' is inconsistent with the MMPA.

DATES: *Effective date:* The amendments in this final rule are effective September 16, 2005.

ADDRESSES: Comments and materials received in response to this action are available for inspection during normal business hours from 8 a.m. to 4:30 p.m., Monday through Friday, at the U.S. Fish and Wildlife Service, Division of Habitat and Resource Conservation, 4401 North Fairfax Drive, Suite 400, Arlington, Virginia. To be sure someone is available to help you, please call (703) 358–2161 before visiting.

FOR FURTHER INFORMATION CONTACT: Diane Bowen, Division of Habitat and Resource Conservation, in Arlington, Virginia, at 703/358–2161.

SUPPLEMENTARY INFORMATION:

Background

After passage of the Marine Mammal Protection Act (16 U.S.C. 1361, *et seq.*) in 1972, we promulgated regulations at 50 CFR part 18 to implement this authority. We included in our proposed regulations a definition similar to that in Section 101(b)(2) of the MMPA for ''authentic native articles of handicrafts and clothing'' (37 FR 25524; December 1, 1972), part of which read:

''* * * *Items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting, so long as the use of pantographs, multiple carvers, or other mass copying devises, or other improved methods of production utilizing modern implements such as sewing machines, are not utilized.*''

The final rule (37 FR 28173; December 21, 1972) added the requirement that these items must be ''commonly produced on or before December 21, 1972'' and read:

''* * * *Items which (a) were commonly produced on or before December 21, 1972, and (b) are composed wholly or in some significant respect of natural materials, and (c) which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass copying devises, or other improved methods of production utilizing modern implements, such as sewing machines. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing, and painting.*''

Although our MMPA implementing regulations were published on December 21, 1972 as a final rule, we invited the public to provide comments, suggestions, and objections for a 60-day period. Based on comments received, we issued a proposed rule to amend our implementing regulations (38 FR 22143; August 16, 1973), followed by a final rule (38 FR 7262; February 25, 1974). The definition for ''authentic native articles of handicrafts and clothing'' at 50 CFR 18.3 was amended by the following additions: (1) The articles must have been made by an Indian, Aleut, or Eskimo; (2) the articles must be significantly altered from their natural form; (3) modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large scale mass production industry results; and (4) the formation of traditional native groups, such as cooperatives, is permitted as long as no large scale mass production results.

The regulations were enforced and subsequently challenged in court. While initially upheld in court, the U.S. District Court called for a thorough administrative review of the section of the regulations (50 CFR 18.23) that addresses the taking of northern sea otters under the native exemptions. Following the review, the Service published a notice of proposed rulemaking on November 14, 1988, to clarify the regulations as they apply to the sea otter (53 FR 45788). Those proposed regulations would prohibit all takings of sea otters by Alaska Natives for the purpose of creating and selling handicrafts or clothing. An interim rule was subsequently published on April 20, 1990 (55 FR 14973). This 1990 rule was, for the most part, identical to the 1974 rule. However, the rule included a qualifying statement with regard to sea otters that stated ''[P]rovided that, it has been determined that no items created in whole or in part from sea otter meet part (a) [that is, ''were commonly produced on or before December 21, 1972''] of this definition and therefore no such items may be sold'' (55 FR 14973). We further stated in the rule that, following the completion of a management plan for northern sea otter, we would replace the interim rule with a final rule, if appropriate. The interim rule became effective on May 21, 1990. Although we developed and issued a ''Conservation Plan for the Sea Otter in Alaska'' in June 1994, we did not revisit the regulatory definition put into place by our interim rule, and the language still exists in 50 CFR 18.3.

In 1990, a number of parties challenged our definition as violating the MMPA. On July 17, 1991, in *Didrickson* v. *U.S. Department of the Interior*, the U.S. District Court for the District of Alaska ruled in favor of the Plaintiffs. The Court wrote that we had defined ''authentic,'' as used in the phrase, ''authentic native articles of handicrafts and clothing * * *'' (in the Native exemption section of the Act), ''in such a way as to broaden [the Service's] own regulatory authority over [Native] activities that the plain language of the statute would not otherwise permit.'' The Court further ruled that the MMPA did not mandate restriction of its Alaska native handicraft exemption to apply only to artifacts commonly produced on or before December 21, 1972. In its conclusion, the Court stated that, while its ''opinion should not be construed as authorizing a ''free-for-all'' killing of hundreds of sea otters,'' the Service ''does not have the authority to regulate the harvesting of sea otters for purposes of creating native handicrafts absent a finding of depletion.'' The Court also stated that the Service has the authority to take enforcement action against any takings that are wasteful. This decision was appealed to the Ninth Circuit Court of Appeals, which, on December 28, 1992, affirmed the District Court's ruling.

Notice of Proposed Rulemaking

On June 4, 2004, we published a proposed rule (69 FR 31582) and requested public comment on the rulemaking to revise our regulations in 50 CFR part 18 and make them consistent with the court rulings described above. Specifically, the action would eliminate the requirement in 50 CFR 18.3 for ''*Authentic native articles of handicrafts and clothing*'' to have been commonly produced on or before

December 21, 1972, and would delete the language at the end of the definition that states:

''*Provided that, it has been determined that no items created in whole or in part from sea otter meet part (a) of this definition and therefore no such items may be sold.*''

Comments on the Proposed Rule

We received two comments on the proposed rule. One commenter fully supported the amendment and urged the agency to make the changes as soon as possible. The other commenter did not indicate whether they supported the amendment but, instead requested that the Secretary of the Department of the Interior reevaluate the regulations regarding native take exemptions should the southwest Alaska distinct population segment of the northern sea otter be listed as threatened under the U.S. Endangered Species Act and, therefore, automatically deemed depleted under the MMPA. This comment is beyond the scope of this rulemaking process, which is to amend the regulatory definition of ''authentic native handicraft'' consistent with a Court ruling. There is a separate rulemaking process that deals with the status of the population.

Conclusion

The Service has concluded that, based on the information presented above and, in consideration of public comments, amendment of the definition of ''authentic native handicraft'' is appropriate and is warranted to be in compliance with a Court ruling.

Required Determinations

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this rule is not a significant regulatory action. The Office of Management and Budget makes the final determination under Executive Order 12866.

a. This rule will not have an annual economic impact of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. There are no compliance costs to any sector of the economy. A cost-benefit analysis is not required. We do not expect that any significant economic impacts would result from the revision of this definition. The only expenses related to this were to the Federal Government to write the rule and required Record of Compliance, and to publish the final rule in the **Federal Register**; these costs should not exceed $25,000.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. This rule will not raise novel legal or policy issues.

Regulatory Flexibility Act

We certify that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial/final Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2). This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

a. This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required.

b. This rule will not produce a Federal mandate of $100 million or greater in any year. As such, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. We have determined that the rule has no potential takings of private property implications as defined by this Executive Order because it removes a regulatory definition determined by a Federal Court to exceed the statutory provisions of the MMPA. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. This rule will not have substantial direct effects on the State, in the relationship between the Federal Government and the State, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This regulation does not contain collections of information that require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* The regulation will not impose new record keeping or reporting requirements on State or local governments, individuals, and businesses, or organizations.

National Environmental Policy Act

We have considered this action with respect to Section 102(2)(C) of the National Environmental Policy Act of 1969, and have determined that the action is categorically excluded, pursuant to U.S. Department of the Interior criteria, from the NEPA process; the preparation of an Environmental Assessment is not required as defined by USDI categorical exclusion 1.10 (516 DM, Chapter 2, Appendix 1, Departmental Categorical Exclusions). This categorical exclusion exempts ''*[p]olicies, directives, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.*'' Given that this rule amends a regulation, in response to a Court ruling, the exclusion applies to this action.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175 and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a Government-to-Government basis. We have evaluated possible effects on federally recognized Indian tribes and have determined that this rule will have a positive effect on tribes as it relieves a regulatory restriction consistent with a Court ruling.

Energy Supply, Distribution, or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this rule is not a significant regulatory action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 18

Administrative practice and procedure, Alaska, Imports, Indians, Marine mammals, Oil and gas exploration, Reporting and recordkeeping requirements, Transportation.

■ In consideration of the foregoing, 50 CFR part 18, subpart A of chapter I, title 50 of the Code of Federal Regulations, is amended as follows:

PART 18—MARINE MAMMALS

■ 1. The authority citation for 50 CFR part 18 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. In § 18.3, revise the definition for *Authentic native articles of handicrafts and clothing* as follows:

§ 18.3 Definitions.

* * * * *

Authentic native articles of handicrafts and clothing means items made by an Indian, Aleut, or Eskimo that (a) are composed wholly or in some significant respect of natural materials and (b) are significantly altered from their natural form and are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass-copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large-scale mass-production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as cooperatives, is permitted so long as no large-scale mass production results.

* * * * *

Dated: August 2, 2005.

Paul Hoffman,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 050209033–5033–01; I.D. 020405D]

RIN 0648–AS97

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Extension of Commercial Trip Limits for Gulf of Mexico Grouper Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; emergency action; extended.

SUMMARY: An emergency rule of February 17, 2005, that established trip limits for the commercial shallow-water and deep-water grouper fisheries in the exclusive economic zone of the Gulf of Mexico is in effect from March 3, 2005, through August 16, 2005. NMFS extends that emergency rule for an additional 180 days through February 12, 2006. The intended effects of that emergency rule are to moderate the rate of harvest of the available quotas, reduce the adverse social and economic effects of derby fishing, enable more effective quota monitoring, and reduce the probability of overfishing.

DATES: Effective from August 17, 2005, through February 12, 2006.

ADDRESSES: Copies of documents supporting this rule may be obtained from the Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Phil Steele, 727–551–5784; fax: 727–824–5308, e-mail: *Phil.Steele@noaa.gov*.

SUPPLEMENTARY INFORMATION: The fishery for reef fish is managed under the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) that was prepared by the Gulf of Mexico Fishery Management Council (Council). This FMP was approved by NMFS and implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

In response to a request from the Council, NMFS published an emergency rule (70 FR 8037, February 17, 2005) under section 305(c)(1) of the Magnuson-Stevens Act, that established trip limits for the commercial shallow-water and deep-water grouper fisheries in the exclusive economic zone of the Gulf of Mexico. The trip limits were, and remain, necessary to slow the rate of harvest of the available commercial grouper quotas, extend the fishing season, reduce the effects of derby fishing, and reduce the probability of overfishing.

The trips limits were originally proposed to the Council by representatives of the commercial reef fish fishery as follows: (1) On January 1, all vessels will be limited to a 10,000–lb (4,536–kg), gutted-weight (GW), trip limit for deep-water grouper and shallow-water grouper combined; (2) if on or before August 1 the fishery is estimated to have landed more than 50 percent of either the shallow-water grouper or the red grouper quota, then a 7,500–lb (3,402–kg) GW trip limit takes effect; and (3) if on or before October 1 the fishery is estimated to have landed more than 75 percent of either the shallow-water grouper or the red grouper quota, then a 5,500–lb (2,495–kg) GW trip limit takes effect. Because implementation of the original emergency rule occurred after January 1, NMFS revised item (1) above to reflect the appropriate implementation date, March 3. This extension of the emergency rule will include at § 622.44(h)(1)(i) the period beginning January 1; therefore, this emergency rule modifies item (1) to again reflect the January 1 date consistent with the intent of the original proposal. NMFS also adds one other minor clarification in this emergency rule to explain that, although the trip limits are for shallow-water grouper and deep-water grouper are combined, if either fishery has reached its quota and has been closed, no fish subject to the closure may be possessed under the applicable trip limit.

Under section 305(c)(3)(B) of the Magnuson-Stevens Act, NMFS may extend the effectiveness of an emergency rule for one additional period of 180 days, provided the public has had an opportunity to comment on the emergency rule and the Council is actively preparing proposed regulations to address the issue on a permanent basis.

NMFS solicited comments on the initial emergency rule through March 21, 2005, and received one comment in