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Noise pollution – an upcoming challenge

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Congress adopted the Marine Mammal Protection Act in 1972 with the primary purpose of protecting dolphins from excessive by-catches (an estimated 350,000 in 1971 alone) from the commercial tuna fishing industry. As commonly occurs, the words used in the legislation were broader than needed for achieving this narrow goal. Now, there are increasing indications that the Act may, in the not-too-distance future, provide the legal basis for regulating noise generated by commercial ships.

Commercial vessels, constructed out of steel and other metals, with powerful engines and large propellers, generate noise that is propagated through the surrounding water. Those of us who have watched war movies involving submarines remember their use of hydrophones to detect passing ships. The US Navy built a sophisticated chain of hydrophones [called the Sound Surveillance System – SOSUS] to detect Soviet submarines (which were designed to be very quiet).

Noise pollution has recently been recognized as a potential threat to certain marine mammals. Whales and other cetaceans utilize echolocation for hunting and make sounds (often referred to as clicks) to communicate. Anthropogenic activities, such as ship operation, generate noises which may interfere with echolocation and the use of clicks for communication.

The Marine Mammal Protection Act prohibits the “taking” of marine mammals. Taking is defined as harassing, hunting, capturing, or killing, or attempts to do so. Harassment has come to mean any human activity that causes documented changes in the distribution or behavior of a marine mammal. The Act is administered by the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA). FWS focuses principally on inland waters and coastal waters within three miles of shore. NOAA focuses on offshore waters. Both agencies have established permit programs to regulate activities that might involve the taking of marine mammals.

Concern about the effect of noise on marine mammals first arose in 1975 with respect to the use of explosives by the offshore oil and gas industry. In 1981, a Small Take Program was implemented that allowed takings of small numbers of marine mammals within defined geographic areas so long as the taking was incidental to the activity, as opposed to intentional.

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The Small Take Program was enforced through issuance of a permit, called a Letter of Authorization. While the initial Letters of Authorization were issued to those in the oil and gas industry, they have since been issued for a wide variety of activities. As regards the noise concern, Letters of Authorization have been issued with respect to missile launches at Vandenberg Air Force Base and for coastal construction projects. The Letter of Authorization is now referred to as the Incidental Harassment Authorization (IHA).

Over time, the permitting process under the Marine Mammal Protection Act has become a bureaucratic nightmare for both the applicants and for the FWS and NOAA. The information required to be submitted by applicants has grown and that information must be reviewed and considered by the agencies before they can issue permits. Private citizens and environmental advocacy groups monitor these permit programs and sometimes challenge permits that they disfavor. These problems are illustrated in the case of a marine biologist from the Woods Hole Oceanographic Institute who applied for a permit to conduct acoustic experiments to test equipment intended to locate whales so that they could be protected from activities such as powerful Navy sonars and seismic surveys. This particular permit was for the purpose of continuing work for which permits had been issued in previous years. The requested permit was issued, but then several environmental advocacy groups brought suit challenging the permit. The court issued an injunction, holding that the agency had to conduct a detailed Environmental Assessment before the permit could be issued. In the meantime, another scientist submitted a request for a permit to conduct similar research in a different location. The agency completed an Environmental Assessment and duly issued the second permit. Several environmental advocacy groups challenged this second permit in another court action. In this second case, the federal court denied plaintiffs' motion for an injunction. In both cases, valuable research time was lost and much money was expended defending actions intended to enhance protection afforded to marine mammals through improved technology. It is somewhat ironic that so much attention has been focused on certain marine noise issues when more significant threats to marine mammals, such as fishery by-catch, have proven less controversial.

A highly controversial, but ultimately tangential, issue relates to use by the United States Navy of new mid-frequency active sonar to detect and defend against military threats, such as a new generation of submarines. Environmental advocacy groups brought a series of legal actions to stop use of such sonar, asserting particular risks to whales and other marine mammals. Despite emergency waivers granted by the Council on Environmental Quality (CEQ), the federal district court and court of appeals ruled that use of the sonar could only proceed after a full Environmental Impact Statement (EIS) had been prepared and considered. The Supreme Court, hearing the case under expedited procedures, found that the National Environmental Protection Act (NEPA) was generally applicable, but that the balance of equities favored national defense over environmental protection. The implication is that, in cases not invoking national defense, the courts will expect full compliance with applicable environmental laws.

The foregoing is background to the significant question of where things are headed with respect to commercial ship operation.

Federal agencies recognize that noises generated by commercial ships have adverse impacts on marine mammals and other creatures in the ocean and coastal waters. The agencies are largely hamstrung, though, by antiquated statutes and limited budgets. Therefore, the agencies are reluctant to undertake initiatives to regulate these activities.

A more likely scenario is that environmental advocates will bring suit against the federal agencies for failure to regulate. This pattern would emulate that adopted with regard to the recent litigation over the failure of the Environmental Protection Agency (EPA) to regulate ballast water discharges. As we now know, the courts in that case interpreted the National Pollutant Discharge Elimination System (NPDES) of the Federal Water Pollution Control Act (FWPCA) to require the EPA to regulate ballast water discharges, and other routine discharges incidental to the routine operation of ships, through a permit program. One should not be surprised to see the noise pollution issue follow a similar course.