Purpose and scope of regulations.

The regulations contained in this part implement section 109 of the Act which, upon a finding by the Secretary of compliance with certain requirements, provides for the transfer of marine mammal management authority to the states.

(a) The regulations of this part apply 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 to the Federal Government.

(b) Nothing in this part 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 or §216.22 of this Title and section 109(h) of the Act, or (2) the adoption or enforcement of any state law or regulation relating to any marine mammal taken before December 21, 1972.

(c) The information collection requirements contained in §§403.03, 403.06, and 403.07 of this part do not require approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq., because there are fewer than 10 respondents annually.

Definitions.

The following definitions apply to this part:

(a) The term species includes any population stock.

(b) 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.

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

(d) 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.


(f) The Secretary means the Secretary of the Interior or the Secretary of Commerce, depending on the species involved. Under section 3(11) of the Act, the Secretary of Commerce has jurisdiction over members of the order Cetacea and members, other than walruses, of the order Pinnipedia; the Secretary of the Interior has jurisdiction over all other mammals. These secretarial authorities have been delegated to the National Marine Fisheries Service and the Fish and Wildlife Service, respectively.

(g) The Service or Services means the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), as appropriate depending on the species involved. Any determination or finding required by this part to be made by the “Service” must be made by the Director of the FWS or by the Assistant Administrator of the NMFS, or their delegates, as appropriate.
§ 403.03 the jurisdiction of the FWS, or to the
Assistant Administrator for Fisheries
of the National Marine Fisheries Serv-
ice (“Assistant Administrator”) for
species of marine mammals under the
jurisdiction of the NMFS. The request
must include:
(1) Copies of existing and proposed
statutes, regulations, policies and
other authorities of state law which
comprise those aspects of the state
management program outlined in para-
graph (b) of this section, and, in the
case of Alaska, paragraphs (d) (1)
through (3) of this section;
(2) A narrative discussion of the stat-
utes, regulations, policies and other
authorities which comprise those as-
pects of the state management pro-
gram 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 re-
quirements of the Act and the regula-
tions of this part; and
(3) Supplementary information as re-
quired 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 of state law concerning
the take of marine mammals that—
(i) Require that the taking of marine
mammals be humane as defined by sec-
tion 3(4) of the Act;
(ii) Do not permit the taking of ma-
rine mammals until the following have
occurred:
(A) The state, pursuant to the re-
quirements of §403.04 of this part, has
determined that the species is at its
Optimum Sustainable Population
(OSP) and determined the maximum
number of animals that may be taken
without reducing the species below its
OSP, and, in the case of Alaska, when
a species is below OSP, the maximum
numbers that can be taken for subsist-
ence uses while allowing the species to
increase toward its OSP;
(B) A cooperative allocation agree-
ment, if required under §403.05(a) of
this part, is implemented;
(iii) Do not permit take in excess of
the maximum number of animals that
may be taken as determined pursuant
to §403.04 of this part; provided that for
Alaska, subsistence take may be al-
lowed in accordance with paragraph (d)
of this section, and if the species is
below OSP, any level of take allowed
for subsistence use shall permit the
species to increase toward OSP;
(iv) Do not permit take that is for
scientific research or public display
purposes except such take by or on be-
half of the state, or pursuant to a Fed-
eral permit issued under §18.31 or
§216.31 of this title; and
(v) Regulate the incidental taking of
the species in a manner consistent with
section 101(a) (2), (4) and (5) of the Act.
(3) Provisions for annually acquiring
and evaluating data and other new evi-
dence relating to OSP of the species
and the maximum allowable take de-
terminations pursuant to §403.04.
(4) Procedures for the resolution of
differences between the state and the
appropriate Service that might arise
during the development of a coopera-
tive allocation agreement pursuant to
§403.05(a) of this part.
(5) Procedures for the submission of
an annual report meeting the require-
ments of §403.06(b) of this part to the
appropriate Service regarding the ad-
ministration of the state management
program during the reporting period.
(6) A description of—
(i) The organization of state offices
involved in the administration and en-
forcement of the state management
program;
(ii) Any permit system relating to
the marine mammals, the laws that
apply to such permits, and the proce-
dures to be used in granting or with-
holding such permits;
(iii) State laws relating to judicial
review of administrative decisions as
they relate to the state management
program;
(iv) State laws relating to adminis-
trative rulemaking as they relate to
the state management program;
(6) A description of—
(i) The organization of state offices
involved in the administration and en-
forcement of the state management
program;
(ii) Any permit system relating to
the marine mammals, the laws that
apply to such permits, and the proce-
dures to be used in granting or with-
holding such permits;
(iii) State laws relating to judicial
review of administrative decisions as
they relate to the state management
program;
(iv) State laws relating to adminis-
trative 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 materials and information as the Service 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 concerning subsistence use of the species—

(1) A statute and regulations concerning the take of marine mammals that ensure that

(i) The taking of marine mammals species for subsistence uses will be the priority consumptive uses of the species;

(ii) If restrictions on subsistence uses of the species are required, such restrictions shall be based upon the customary and direct dependence upon the species as the mainstay of livelihood, local residency, and the availability of alternative resources; and

(iii) The taking of marine mammal species for subsistence uses is accomplished in a non-wasteful manner;

(2) Statutes or regulations that ensure that the appropriate state agency will—

(i) Authorize nonsubsistence consumptive uses of a marine mammal species only if such uses will have no significant adverse impact on subsistence uses of the species;

(ii) Regulate nonsubsistence consumptive uses in a manner which, to the maximum extent practicable, provides economic opportunities, including, but not limited to, licensing of marine mammal hunting guides and the assignment of guiding areas, for residents of rural coastal villages of Alaska who engage in subsistence uses of the species; and

(iii) Make written findings supporting the authorizations and regulations described in this paragraph based solely on the administrative record before the agency;

(3) A narrative discussion of the statutes or regulations required under paragraph (d)(2) of this section, and any additional policies or procedures concerning the regulation of nonsubsistence consumptive uses of marine mammals. This discussion must explain how the State's program satisfies the requirements of section 109(f) of the Act, namely that the regulation of nonsubsistence consumptive uses of marine mammals provides, to the maximum extent practicable, economic opportunities for the residents of rural coastal villages of Alaska who engage in subsistence uses of the species.

(e) To assist states in preparing the state management program for submission, the Service 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 Services. Notwithstanding preliminary review by the Service, once any proposed aspect of the state management program has been prepared and submitted in final form, it shall be subject to final review and approval under paragraphs (f) through (h) of this section.

(f)(1) After receiving the state's request, for management authority, the Service shall make an initial determination on whether the state's management program meets the requirements of the Act and these regulations.

(2) Within 45 days after receiving the state's request, unless the state and the Service agree to another time period, the Service shall publish a general notice of its initial determination in the \textit{Federal Register} together with, in the case of a positive determination, the text of a proposed rule to transfer management authority to the state. The general notice shall contain a summary of the major components of the state's management program and shall indicate where the full text of the
management program may be inspected or copied. The public shall be allowed to submit written comments and to request an informal public hearing on the Service's initial determination and the state's management program within 60 days of publication of the general notice.

(g) If requested, the Service may conduct an informal public hearing after publishing 30 days' advance notice of the date, location, and time of such hearing in the Federal Register.

(h) After considering all comments and other relevant information, the Service shall publish in the Federal Register its final determination on whether the state has developed and will implement a management program that meets the requirement of the Act and these regulations. In the case of a positive final determination, the Service shall publish with the notice a final regulation transferring management authority for the species to the state after the following requirements are satisfied:

(1) The state's determinations pursuant to §403.04 of this part are final and implemented under state law;
(2) Any cooperative allocation agreement required under §403.05(a) of this part is implemented; and
(3) The state has enacted and submitted to the Service laws and policies that are substantially the same as those provided pursuant to §403.03(a) in proposed form in the state's management program.

§ 403.04 Determinations and hearings under section 109(c) of the MMPA.

(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) of the Act, to determine the optimum sustainable population of the species and the maximum number of animals that may be taken from populations it manages without reducing the species below OSP. 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 responsibility for managing the species in the event management authority is transferred to the state 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 Service and the public and shall provide access to or copies of the documentation supporting its determinations to the Service 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