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UNITED STATES DEPARTMENT OF COMMERCE
Office of the Under Secretary for
Oceans and Atmosphere
Washington, D.C. 20230

Whales

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MEMORANDUM FOR: *Distribution
FROM: *Becky Rootes*
Becky Rootes
Office of the Under Secretary
National Oceanic and Atmospheric
Administration, Department of Commerce
SUBJECT: Document Reviewing U.S. Whale Policy

This year a number of critical issues will be addressed by the International Whaling Commission (IWC) concerning the future of international whale conservation and management. In anticipation of the May IWC meeting, it is expected that a review of the philosophical basis for U.S. whale policy as well as specifics on positions for this year's meeting will be conducted in the next month or so. In order to prepare for a high level review, NOAA has prepared the attached paper and is requesting comments both generic and specific on its contents. This paper is a DRAFT and for OFFICIAL USE ONLY. Please forward any comments to U.S. IWC Commissioner John A. Knauss or myself by March 8, 1993. We can be reached at (202) 482-3436, fax (202) 408-9674, or Office of the Under Secretary, NOAA, Room 5128, Department of Commerce, 14th and Constitution Avenue, Washington, D.C. 20250.

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IWC POLICY REVIEW, AN URGENT ISSUE FOR THE FIRST 100 DAYS

On October 26, 1992, the Secretary of Commerce advised President Bush pursuant to the so called "Pelly Amendment" to the Fishermen's Protective Act¹, that the lethal research program being conducted by Norway on its coastal minke whales diminished the effectiveness of the conservation program of the International Whaling Commission (IWC). On December 23, 1992, the President reported to the Congress as required by that law, that he had decided not to restrict imports from Norway. He also expressed his concern about Norway's announcement that it will resume commercial whaling in 1993 without regard to the decision of the IWC with respect to the current world wide moratorium on commercial whaling. He assured Congress that U.S. concerns would be conveyed to "the highest levels of the Norwegian Government" and his views were conveyed to the Prime Minister on January 12, 1993.

The Department of State reports that Gro Bruntland is seeking a meeting with the President elect or the Vice President on broad political issues, including the whaling issue. The whaling issue involves more than U.S.-Norway relations. The moratorium on commercial whaling and the related issues that will be discussed and resolved (or not resolved) at the May 1993 meeting of the IWC in Kyoto, could complicate U.S. relations with several other

¹ As applied to the case of whaling, the Pelly Amendment (22 U.S.C. 1978(a) requires that when the Secretary of Commerce determines that whaling activities conducted by nationals of a foreign country are "diminishing the effectiveness" of the International Whaling Commission or its conservation programs he must certify that fact to the President. The President may then impose sanctions on products imported from that country, to the extent consistent with GATT. If the President does not ban the import of all fishery products from that country he must advise the Congress within 60 days of receipt of the certification. The term "diminish the effectiveness" as interpreted does not require that the whalers of the other nation be acting illegally. Article VIII of the convention states, in part: "Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention." Nonetheless, the IWC has established criteria for the conduct of such research. It considers that research which does not need all criteria to be inconsistent with IWC conservation program. The Norwegian research was found to diminish the effectiveness of the conservation program of the IWC because of concerns expressed by the IWC.

The question of whether the banning of products, other than whale products, from Norway would be consistent with GATT is troublesome. The United States has argued that it would be consistent. The current weight of international legal opinion seems to be that it would not.

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nations notably Japan, and to a lesser degree, Russia and Iceland. The results of the 1993 meeting may also be critical for the future well being of the IWC as well as world's whale stocks. The Deputy Chairman of the IWC has called for an extraordinary meeting of interested commissioners in mid-February to see if they can agree on a way to avert the crisis brooding over the future of the IWC.

The pivotal question for the IWC is, should it continue its world wide moratorium on the commercial taking of all whales in all waters, or accept the limited taking of whales under IWC revised management procedures (RMP). This issue is likely to be considered.

The IWC has come a long way in the last decade. At the time of the adoption of moratorium in 1982, the IWC had a well earned reputation for an inability to conservatively manage whale resources, and one species after another was decimated. It is generally accepted that under the RMP, which has been a half dozen years in development, that a limited number of whales of certain species could be taken while maintaining or increasing, robust whale populations.

There are roughly 750,000 minke whaler in the Antarctic and 85,000 off the coasts of Norway. Some take of whales from these stoker is possible with no observable effect in the populations.

It is important to recognize, therefore, that how the United States votes on this issue is not a matter of whale conservation but is a "whale rights" issue, i.e., should the IWC recognize some right to life inherent in whales? This position is vigorously advocated by a number of conservation and animal rights groups.

If the answer is, "Whales enjoy special rights and should be protected without regard to robustness of whale stocks," the United States should be prepared to answer several subsidiary questions as a test of the limits of its support for this position. For example:

(1) Should the United States argue for a ban on commercial whaling in all waters, including the coastal waters of some nations that do not accept the "whale rights" position of the United States and other like minded nations, or should the ban apply only to the high seas, and leave it to each coastal nation to decide for itself whether it wishes to resume limited whaling within its coastal waters under the RMP?

(2) Should the ban apply to all whaling, including the taking of whales for research purposes, and the taking of limited number of whales for aboriginal subsistence, a practice currently allowed under the moratorium. Although the United States has not

taken any whales for research purposes since the moratorium, it does, with IWC approval, oversee limited aboriginal whaling along the North Slope of Alaska.

(3) Does the United States feel strongly enough about the "whale rights" issue that it is prepared to chance the possibility that those nations who believe otherwise (including Japan, Russia, and Norway) may leave the IWC and form separate "whale conservation" organizations? We might then have two or more international whaling organizations each built on a different ethical base.

(4) Is the United States prepared to accept the consequences of appearing to adopt a Trojan Horse strategy? If acceptance of conservation is seen as a ruse by the United States and western European countries to further pressure developing countries to forgo legitimate natural resource utilization within national boundaries, the effect could be devastating in other international fora in which the United States is pressing conservation issues.

In order to place these questions in context, the following background discussion is provided.

Background

Recent IWC History: The IWC is not a United Nations organization, but is universally recognized as the inter-governmental agency responsible for international whale conservation and management. The Law of the Sea recognizes the possibility of the existence of more than one organization for the conservation and protection of marine mammals, but currently there is no competing regional or world-wide organization dedicated to the conservation of whales. The IWC predates developments in customary international law regarding the rights of coastal states in their 200 mile Exclusive Economic Zone (EEZ). Perhaps this history is the reason for the provision in the Convention that accords jurisdiction to the IWC over whaling wherever it occurs. Several members of the IWC, not the U.S., have suggested that the International Convention for the Regulation of Whaling (Convention) should be amended to recognize greater rights of each coastal state over whale resources within its EEZ. The Convention applies to all factory ships, land stations, and whale catchers under the jurisdiction of the Member Governments. However, the management program operates only upon stocks of whales listed in the Schedule to the Convention (Schedule). These are primarily the great whales subject to past commercial exploitation. To add additional stocks to the Schedule requires a three quarters vote of the members. Several member countries are reluctant to vote to add additional species of small whales such as dolphin and porpoise to the management regime of the IWC

since these animals generally inhabit coastal waters and these nations are unwilling to accept additional intrusions of the IWC management regime into their EEZ.

Since its founding, membership has been open to any nation wishing to join and pay the annual dues which provide the sole source of income to fund the operations of the organization. Membership in the organization had initially been made up primarily of nations that had a domestic whaling industry. Consequently, the Convention is designed to assure the vitality of the whaling industry by maintaining the health of the stocks of whales harvested. One historical result of the concern for the whaling industry, was a tendency in the past for the IWC to establish quotas for commercial whaling based upon scientifically unsupported optimistic assumptions regarding the size of the whale stocks and their ability to withstand the harvest quotas established. That short-sighted, unscientific policy depleted the stocks of the great whales to levels where eventually it became clear even to the whaling nations that commercial whaling on at least some species must cease. Commercial whalers sought out smaller species of whales as the larger, more commercially desirable were depleted, species and the sad process was repeated on the smaller animals.

Over the last two decades, several of the original whaling nations, notably the United States, the United Kingdom, the Netherlands, Australia, Brazil, and New Zealand, adopted laws and policies prohibiting commercial whaling by persons subject to their jurisdiction. Joined by other nations that became members of the IWC out of concern for the plight of the world's whales, these members pushed to require the IWC to adhere more faithfully to the conservation principles upon which the Convention was established. Finally, in 1982, the necessary three-quarters majority of the membership agreed to a world wide moratorium on commercial whaling for all whales subject to the Convention's conservation program. The moratorium, which is incorporated in Paragraph 10(e)² of the Schedule, provides for a moratorium on all commercial whaling, and required the IWC to conduct a comprehensive assessment of the effects of that decision on of the whale stocks. Upon completion of the assessment, quotas different than zero may be established by the IWC (by three-quarter majority vote).

² Paragraph 10(e) reads: Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

The moratorium was ultimately agreed to by all members except Norway and Russia, but these two nations have also refrained from commercial whaling since 1988. The moratorium was recognized as a genuine conservation advance, but at the time it was adopted it was not viewed as a fundamental change in the nature of the Convention which remained a resource conservation treaty. Establishment of the moratorium sent a clear signal that whales would be scientifically conserved, not that they would be religiously protected. Where the status of a whale stock was not well understood, commercial harvesting would not be allowed. But implicitly, harvesting would be permitted when it was determined that it could proceed based on sound principles of resource conservation and management.

The institution of the moratorium resulted in an unfortunate, but perhaps foreseeable, development. To supplement its diminished domestic supply of whale meat, Japan turned to harvesting greater numbers of smaller cetaceans (including dolphins and porpoise) in its coastal waters. These animals are not included in the Schedule to the Convention, and thus not subject to the moratorium. The result has been that the Dall's porpoise has been dangerously overharvested in Japan's coastal waters and several other species of dolphins may similarly be in jeopardy. Attempts to amend the Schedule to the Convention to afford protection to these species have been unsuccessful because the whaling nations now fear an automatic moratorium on all species added to the Schedule. Furthermore, inclusion of small cetaceans is seen by some nations as an unwarranted intrusion on national sovereignty, because the IWC management program would apply to additional species in coastal waters of the member states.

The United States' policy on the moratorium has been publicly stated within the IWC and was published in the wide Federal Register in 1990. That policy consists of three criteria, each of which must be fulfilled before the United States would consider supporting a relaxation of the moratorium on any whale stock.

1. The comprehensive assessment of the stock must be completed.
2. The IWC must adopt a revised management procedure that is scientifically sound and designed to ensure that whale stocks for which quotas are established will not be depleted, but will remain at optimum levels with a high degree of confidence.
3. The IWC must adopt arrangements and procedures that will be followed to assure that the requirements of the management procedures are strictly enforced and that all data necessary for the implementation of these procedures are faithfully and accurately recorded and maintained.

All members of the IWC essentially agree with that position, but vary in their assessment of the extent to which each element has been achieved. Although fulfillment of the three conditions is the minimum required for U.S. support for ending the moratorium, the United States left open the possibility that it might not vote to lift the moratorium even under circumstances where carefully regulated harvests could be conducted without affecting the vitality of the stocks. Adoption of such a whale protection stance in the context of the Convention would be a fundamental change in U.S. policy. Several domestic whale protection organizations have recently urged the U.S. Commissioner to make that change.

The United States has not indicated publicly, or decided internally, whether it has, in fact, changed its policy. Until recently, it was assumed that the question of whether to exercise the no whaling policy option would not have to be addressed in this decade because technical difficulties were thought to make attainment of the three conditions unlikely before the year 2000. It appears now that the question will have to be addressed soon. Comprehensive assessments have been completed on several stocks and revised management procedures have been adopted in principle for stocks that are of interest to the whaling nations. Completion of the administrative arrangements is now considered possible at the 1993 meeting of the IWC, or at latest, the 1994 meeting.

The impending decision on the moratorium has triggered a crisis within the IWC. The nations that would like to resume whaling have become increasingly restive as the result of what they view as unjustified attempts by the majority of the members³ to erect new obstacles to achieve compliance with the conditions for the ending of the moratorium. Iceland withdrew from the IWC effective June 30, 1992, citing what it considered a de facto transformation of the Convention from a whale conservation treaty into a whale protection treaty. Norway announced at the 1992 meeting that it will commence commercial whaling in its coastal waters in 1993, applying the revised management procedure adopted by the IWC in 1992, regardless of whether the IWC ends the moratorium on the stock of minke whales in Norwegian coastal waters. Since Norway has registered a formal objection to the moratorium provision as guaranteed by the Convention, it is not bound by the requirements of the moratorium. Nonetheless unless the IWC authorizes Norwegian whaling, such an action would likely "diminish the effectiveness of the IWC" which would require

³ For example, the U.K. has suggested that commercial harvest could only be permitted if it could be guaranteed that each whale would be humanely killed. In the British lexicon this means the animal must be immediately killed or rendered insensitive to pain, so that it experiences no pain.

action by the Secretary of Commerce under the so called "Pelly Amendment". The issue of the resumption of coastal whaling is so sensitive that Norway probably would withdraw from the body if it concludes there is no possibility of whaling under the Convention.⁴

Iceland, Norway, the Fovea Islands and Greenland recently entered into an agreement establishing the North Atlantic Marine Mammal Commission (NAMMCO). Canada, which withdrew from the IWC several years ago, Japan, and Denmark are observers but not members. The organization currently deals with research on marine mammals of the North Atlantic. It also intends to provide management advice for seals and small cetaceans. However, the members clearly contemplate its expansion to manage whales of the region should that be in the interest of the members. Norway's withdrawal from the IWC would accelerate such a change in NAMMCO. This could lead to the establishment of similar organizations for whales in other regions and the decline of the scientific and political influence of the IWC.

Current Issues: The Schedule recognizes two types of whaling: commercial whaling which is subject to the moratorium, and aboriginal subsistence whaling which is not. Although neither term is defined in the Convention, commercial whaling is considered to be whaling done with a commercial purpose-the whale meat and blubber are sold. Aboriginal subsistence whaling is whaling conducted to satisfy subsistence needs of aboriginal people or the cultural needs of these people satisfied by hunting or ceremonial activities. The whale meat and blubber are to be used exclusively for consumption by the aborigines, but not sold. Based upon proven cultural needs of the Alaskan Eskimos and a scientific assessment of the stock, a total quota of 154 Bowhead whales is allocated to American Eskimo people for the years 1992, 1993, and 1994. Continuation of the Eskimo harvest is a significant native American rights issue. Curtailment of the Alaskan aboriginal subsistence harvest would risk significant social unrest in native villages in Alaska.

Certain small whaling villages in Japan have traditionally participated in small scale whaling for local consumption. Japan argues that this "small type coastal whaling" shares several of the attributes of aboriginal whaling. There are strong cultural and traditional aspects to this whaling. The product is consumed domestically, the number of whales needed to satisfy this type of whaling is small, and the vessels used are small. Nonetheless it has been considered commercial whaling and subject to the moratorium because much of the product is sold.

⁴ For a more detailed analysis, see Central Intelligence Agency, Intelligence Memorandum of 15 December 1992 entitled, Norway: Bruntland Determined to Whale (Confidential NOFORN).

Japan has advised the United States that it will "reconsider its relation" to the IWC if it is not granted an emergency allocation of 50 minke whales for the small type whaling operations traditionally conducted in Japan's coastal waters. This is a sensitive internal political issue for Japan. It has made the request at each of the five most recent annual meetings of the IWC. The position of the United States and like minded members is that the type of whaling involved is commercial whaling. Therefore, the request cannot be granted until the moratorium is lifted. Japan points out that its small scale whaling by communities with a history of local harvesting and consumption is similar to aboriginal whaling conducted by American Eskimos of the whaling villages situated on the coast of the Bering and Beaufort Seas. Member nations that favor a resumption of regulated commercial harvest of whales seldom forego an opportunity to point out the apparent hypocrisy in the United States' unwillingness to support a harvest by Japanese villagers of non-threatened minke whales in light of our advocacy for aboriginal subsistence whaling quotas on the endangered bowhead whales.

There are indications that Russia may be considering withdrawal from the IWC in order to institute a limited commercial whaling program. However, this is not considered likely within the next couple of years. In December 1992, it announced that it had permitted the take of three bowhead whales for aboriginal purposes, even though it had not advised the IWC of any aboriginal need for bowheads. That number coincides with the remainder of the permissible quota of bowheads not taken by American Eskimos in 1992.

The mere possibility of the lifting of the moratorium has had another consequence. In order to prevent the harvest of Southern Hemisphere minke whales if the moratorium should end, France has put forward a proposal to establish an Antarctic Sanctuary. If adopted, the sanctuary would preclude the commercial harvest of whales in waters south of 40 degrees South latitude thereby protecting the large stock of Southern minke whales (population about 760,000 animals) from any commercial whaling. The United States has indicated that it supports the French proposal in principle and would work to make it acceptable to the IWC membership.

The whaling nations see the French proposal as an attempt to circumvent the process established for the review of the moratorium, and strongly oppose it both because of its direct effect on commercial whaling opportunities in the Antarctic region, and for the precedent it will set for other stocks of minke whales in the northern hemisphere. Since the French proposal would include the coastal waters of Argentina, it also has implications for those nations concerned about encroachment

on national sovereignty. The Japanese Government has expressed an additional important concern. In 1988, Japan commenced a 16-year research program in the Antarctic which involves the killing of minke whales. The right to conduct such research is reserved to each member state by the Convention. The discussion paper accompanying the French proposal states in one place that research whaling in the Antarctic would not be affected by establishment of the sanctuary. In another part of the document, there is a quite clear suggestion that all whale research in the sanctuary would be reviewed and approved by the IWC and its Scientific Committee. Japan is concerned that the French proposal is designed to pressure Japan to terminate its research as well as to prevent a resumption of commercial whaling. Japan views this as an issue of scientific integrity and will not agree to the French proposal if it is interpreted to allow the IWC to disapprove research whaling in the Antarctic.

U.S. Position: The United States has been a leader within the growing number of conservation-minded countries in the IWC. If the United States were to adopt a position supporting absolute protection for whales for ethical or humane reasons, it would be difficult for other "like-minded" countries to accept any compromise. The likely outcome would be an absolute ban on all commercial whaling by the IWC. Such a protectionist result would foreclose further dialogue within the IWC regarding the Antarctic sanctuary and small cetaceans. Given such a clear signal that the nature of the IWC has changed from a conservation organization to a whale rights organization, many believe it likely that Japan, Korea, Russia, Norway and possibly Denmark would withdraw from the IWC. Together with Iceland and possibly Canada, they could enter into a series of regional arrangements patterned after NAMMCO for the conservation of large and small whales. It is likely that they would apply the RMP for whale conservation recently adopted in principle by the IWC, perhaps "tuned" to allow higher whale harvest quotas. With the leadership of those nations, it is possible that some Southeast Asian, African or South American nations that are not now members of the IWC would enter into additional regional arrangements to assure the sustainable use of whales, dolphins and porpoises in accordance with the principles of sustainable development adopted at the "earth summit" in Rio de Janeiro in the summer of 1992.

Attempts by the United States to prevent the proliferation of such regional organizations over which it would exercise minimal influence would probably be unsuccessful. Vigorous efforts in that direction although welcomed domestically, is likely to be portrayed as putting the rights of whales ahead of the rights of protein-starved citizens of developing nations. Japan has already noted that whales could provide a ready source of protein for developing countries bordering on the sea. Furthermore, adoption at Rio of UNCED Agenda 21 which endorses the sustainable management of renewable resources is viewed by many countries as

condoning, if not mandating, commercial whaling. Animal protection groups contend that if the IWC should cease to be a viable organization, management authority could be assumed by the United Nations. In light of UNCED Agenda 21, and the sizeable body of scientific information on the recovering status of some whale stocks, it is unclear what course of action the United Nations would take. The success that the United States enjoyed on the driftnet issue in the General Assembly is probably not a good indicator of the likelihood of the outcome with respect to whales. In the drift net case, the incidental take of birds and mammals was large, uncontrolled, and totally wasteful. Its effect on some birds and mammals was unknown but was suspected to be disastrous. The facts surrounding the commercial whaling issue are totally different.

Possible Compromise: If the United States wishes to minimize the possibility of regional whaling organizations being formed and create negotiating room to move the IWC toward accepting some form of a whale sanctuary in the Antarctic convergence zone where commercial whaling would be forbidden, it must be willing to accept resumption of some form of commercial whaling with safeguards to assure that no stock of whale would be harvested to the point of depletion. A basis for compromise might be centered around the Japanese concept of small scale coastal whaling in which the whale meat would be limited only to domestic use and sale. The Sanctuary would be acceptable to countries such as Norway and Russia that are interested only in coastal whaling. In the long run, it may also be acceptable to Japan, especially if it is of a fixed duration, since Japan has no compelling economic need for the whale meat from the Antarctic at this time. If Japan could institute a coastal whaling program to address the politically sensitive question of local needs, and could be confident that its ongoing Antarctic research could continue, it may accept a compromise that would involve forgoing high seas commercial whaling. Even if the solution were not ideal from Japan's viewpoint, it is unlikely that it would attempt to derail a compromise that was satisfactory to the other coastal whaling states.

From the U.S. perspective the advantage in keeping the IWC together is that it would enable the United States to continue to promote an expanded cetacean program for all interested nations in a forum that has become a scientifically-based, conservation-oriented organization. Maintaining the IWC would continue our leadership role in an organization which regulates whaling in all waters. Continuing dialogue could also lead to progress on the international conservation of small cetaceans. Moreover, keeping Japan in the IWC could foreclose development of an international market for whale products and would remove economic incentives for full blown development of commercial whaling which led to over harvesting in the first place.

Finally, U.S. membership in an organization that includes commercial whaling nations provides greater confidence that the U.S. Eskimo harvest may be allowed to continue. The United States would soon find itself increasingly isolated, as it attempted to justify to an animal rights-oriented IWC that the inefficient, and to some, inhumane Eskimo subsistence harvest should continue. Curtailing of that harvest would pose a significant domestic problem for the United States.