

## OCEAN & COASTAL LAW ENFORCEMENT

### Part II: Enforcing Protected Species Laws in the Marine Environment

ENVIRONMENTAL LAW INSTITUTE, WASHINGTON DC

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#### SEMINAR SUMMARY

Compliance is critical to the successful conservation and protection of marine mammals and threatened and endangered marine species. Compliance can be achieved through a variety of mechanisms including the use of enforcement to halt and deter illegal actors. The major U.S. statutes established to protect threatened and endangered species and marine mammals – including the Marine Mammal Protection Act and the Endangered Species Act – require effective land-based and at-sea enforcement in order to achieve these statutes' objectives. This means ensuring compliance in over three million square nautical miles of ocean to protect species in U.S. waters, as well as the use of trade barriers to prevent the illegal trade in endangered species in waters in and beyond U.S. jurisdiction. In addition to the logistics of ocean enforcement, agencies charged with protecting marine species face growing challenges in the form of funding and personnel constraints.

The panel featured expert speakers whose experiences with the National Oceanic and Atmospheric Administration, the U.S. Coast Guard, the U.S. Department of Justice, and Greenpeace provided the foundation for a discussion of key challenges, success stories, and potential opportunities to strengthen marine protected species enforcement.

#### MODERATOR:

- **Jordan Diamond**, Deputy Director, Ocean Program, Environmental Law Institute

#### PANELISTS:

- **Steven Tucker**, Deputy Chief for Marine Protected Species, U.S. Coast Guard
- **Tracy Dunn**, Acting Deputy Director, Office of Law Enforcement, National Oceanic & Atmospheric Administration
- **John Webb**, Former Assistant Chief, Environmental Crimes Section, Environment and Natural Resources Division, U.S. Department of Justice
- **Phil Kline**, Senior Ocean Campaigner, Greenpeace U.S.

Mr. Tucker began the panel by describing the evolution of the U.S. Coast Guard, and its continuous programmatic goal of protecting living marine resources long before species were statutorily protected. Mr. Tucker then discussed the Coast Guard's role under the Endangered Species Act (ESA), which specifically identifies the Coast Guard as an enforcement body. The Coast Guard currently has eleven statutory missions that fall under three maritime themes: safety, security, and stewardship. The Living Marine Resources (LMR) Enforcement Program engages in two enforcement activities: LMR Law Enforcement, i.e., enforcing domestic fisheries and marine protected resource regulations; and Other Law Enforcement, i.e., protecting the Exclusive Economic Zone from foreign fishing vessels and interdicting illegal fishing activity on the high seas.

Mr. Tucker explained that Coast Guard enforcement is guided by Commandant Instruction 16475.57 establishing the Protected LMR Program. This framework establishes accountability for national issues at the headquarters level and a tailored approach to local concerns at the district level. Ocean Steward, a capstone document laying out broad Coast Guard stewardship principals, articulates the Coast Guard's stewardship priorities and provides the context for stewardship activities at-sea.

Mr. Tucker emphasized that Coast Guard practice is shaped by inherent enforcement challenges, specifically a vast 3.36 million square nautical mile sea-surface jurisdiction and numerous recreational, commercial, and industrial user groups. The breadth of its jurisdiction makes voluntary compliance and enforcement critical. The Coast Guard maximizes its limited resources in keeping with the goal of supporting sustainable management regimes. For example, Coast Guard officers regularly meet with fisheries management councils and sanctuary advisory councils to share information and expertise. By leveraging partnerships, which it helps to maintain by strategically framing its communications to be consistent with partner goals, the Coast Guard enhances enforcement across a broad jurisdiction and gains access to diverse expertise.

Mr. Tucker described Coast Guard LMR/Marine Protected Species activities as generally pelagic, located near the sea surface and outside three nautical miles from shore, though one notable contrast is nearshore vessel speed and approach enforcement to protect manatees. The Coast Guard interacts with both knowing and unknowing violators, which in turn affects the prioritization of enforcement efforts. Mr. Tucker concluded by reiterating the Coast Guard's history, culture, and mission of protecting marine species.

Mr. Dunn followed by discussing the structure of the National Oceanic and Atmospheric Administration's (NOAA's) Office of Law Enforcement (OLE), located within the National Marine Fisheries Service. The only dedicated law enforcement agency for protecting living marine resources, OLE has six divisions, each with a lead special agent and a group of investigators and enforcement officers.

Mr. Dunn reiterated Mr. Tucker's comments about the importance of using partnerships to cover OLE's vast sea-surface jurisdiction. OLE partners with the Coast Guard and enforces their regulations dockside, while the Coast Guard focuses on at-sea enforcement. The Coast Guard processes smaller cases through their fishery training centers and forwards them directly to NOAA attorneys. OLE also

partners with state conservation agencies via Joint Enforcement Agreements (JEAs), and provides them with federal funds for state patrol services; again, states investigate smaller cases and prosecute them in state courts, and then OLE investigators provide additional support for more complex and larger cases.

Mr. Dunn highlighted OLE's new Enforcement Officer Program, which is increasing the number of uniformed enforcement officers as recommended by the [2010 NOAA Inspector General \(IG\) Report](#). Enforcement officers enhance on-scene enforcement and collaborate with partners to provide compliance assistance, as demonstrated by vessel speed and approach restriction implementation and the Turtle Excluder Device regulations enforcement campaign. To reduce unintentional violations, enforcement officers also conduct outreach programs to inform the public about fisheries laws and specific areas of concern.

While there will be a reduction in the number of special agents because of the increase in enforcement officers, Mr. Dunn emphasized that special agents are more focused on catching regular violators. Special agents complete extensive training at the Federal Law Enforcement Training Center and the Marine Law Enforcement Training Program, and undergo NOAA OLE BASIC Training on laws, gear, and fishing practices. Special agents learn on-the-job by spending time with industry members that support increased fisheries compliance. They receive interviewing and fraud training to increase detection of smuggling schemes. Mr. Dunn concluded by describing recent OLE successes, including imprisoning a Florida resident for importing endangered and threatened species. Photos and objects from protected marine resource violations are currently on display at the Crime Museum in Washington, D.C.

Mr. Webb introduced his presentation by stressing that environmental crimes are not just environmental statute offenses, but also white collar crimes and economic crimes. Now retired, Mr. Webb explained that during his decades of service with the Environmental Crimes Section of the Environment and Natural Resources Division of the Department of Justice (DOJ), agency prosecutors reached for the U.S. Code Crimes volume, Title 18, as much as they reached for the conservation statutes in Title 16. This is at least in part because Title 18 has significant teeth and does not require demonstration of either intent or actual harm to wildlife or an actual violation of a Title 16 offense. President Carter established dedicated wildlife crime prosecutors in the late 1970s, facing a need for a cadre of prosecutors to respond to an increase in species-smuggling cases following the ratification of the Convention International Trade in Endangered Species of Wild Flora and Fauna (CITES). Today the Section employs between 15-20 prosecutors who handle crimes involving wildlife nationwide either full- or part-time.

Mr. Webb explained how white collar prosecution is an effective deterrent that supplements the shortcomings in criminal provisions in environmental statutes. For example, the maximum punishment for violating the ESA is a misdemeanor. DOJ's December 1999 article in the U.S. Attorney's Bulletin entitled ["Prosecuting Wildlife Traffickers: Important Cases, Many Tools, Good Results"](#) advocates the use of white collar crime as a unique and effective arrow, and describes how the Sentencing Guidelines enable courts to incarcerate major violators of wildlife laws using transparent factors to determine sentence severity. In turn, prosecutors instruct investigators to use these factors when conducting investigations.

Mr. Webb noted that the ESA contains numerous effective tools that commonly support prosecution. Its broad definition of “take” includes “harm,” “harass,” and inchoate acts; in addition, both the Fish and Wildlife Service and NOAA have expanded on the definitions of “harm” and “harass,” making them powerful tools for protecting marine species and environments. Although not used, the ESA also has a foreign commerce provision that enables the federal government to prosecute U.S. citizens buying and selling marine protected species abroad. Finally, Mr. Webb highlighted that the ESA criminalizes non-compliance with management tools and permit violations, potentially also resulting in forfeitures and civil penalties.

Mr. Webb discussed the prosecutorial strengths and weaknesses of other environmental statutes. CITES contains an ambiguous “introduction to the seas” requirement, but also arms prosecutors with its possession prohibition, which states that violators can be prosecuted as long as they continue to possess illegally traded (i.e., imported or exported) species. The Lacey Act includes a strong false statement provision, which has no materiality requirement. In contrast, the MMPA is infrequently used because its provisions regarding permits create too much uncertainty for prosecutors.

As a general matter, Mr. Webb explained that environmental statutes require prosecutors to answer numerous multifaceted questions, including what species are covered, what conduct is permitted, whether there are permits and whether they are valid, and more. Given the complexity of environmental statutes, prosecutors often find white collar crime more useful. Another hurdle for prosecutors is the requirement in conservation statutes generally applicable to marine species that prosecutors show the defendant was aware of the fact constituting the offense, including the identity of the species.

Mr. Webb concluded by discussing penalties and white collar crime tools. Prosecutors can make violators pay for exploiting the environment, even restitution to foreign or state governments for loss of resources, [\*see, e.g., U.S. v. Bengis, 631 F.3d 33 \(2011\)\*](#). Available white collar tools include: the conspiracy law, which criminalizes conspiracy to interfere with government functions; false statements; and obstruction of justice, which carries a 20-year felony charge for destroying evidence for ongoing or potential prosecutions.

Mr. Kline began by highlighting the strong penalty provisions within the ESA and the MMPA, such as the ability to revoke permits and restrict activities, which often exceed the cost of doing business. He noted the high level of monitoring and enforcement ongoing in the United States by the Coast Guard, NOAA, and state agencies as well as by a small, tight-knit marine community through numerous trade publications and associations.

Mr. Kline described his experiences with the 1990 Steller sea lion threatened species listing to demonstrate the strengths and weaknesses of the Acts and of litigation; to emphasize that Congress can change the laws and make exceptions; and to provide an example of the unconventional relationships that may develop along the way. First, following a 1990 biological opinion (BiOp), the Steller sea lion was listed as a threatened species throughout its habitat from west of the Aleutian Islands to California.

As part of the threatened finding, the Fish and Wildlife Service determined reasonably prudent alternatives (RPAs) to ensure the species would not go extinct and designated critical habitat.

In 1997, a second BiOp was published following the finding of two Steller sea lion populations, which included findings of jeopardy and adverse modification to critical habitat due to commercial fishing of pollock. The 1997 opinion did not address cod or mackerel fishing, likely because of internal politics. In 1998, Greenpeace and the American Ocean Campaign filed litigation against the government for failure to protect Steller sea lions under the MMPA and ESA. In 1999, a third BiOp was published, which again included findings of jeopardy and adverse modification to critical habitat due to commercial fishing of pollock. This time, Greenpeace obtained an injunction to stop all pollock trawling. In response, Senator Ted Stevens (then Chairman of the Senate Appropriations Committee) put in a rider overriding the ESA and giving the North Pacific Fishery Management Council authority to determine its own RPAs. Mr. Kline explained that the federal judge wanted to review the effectiveness of the RPAs, and thus ordered a new BiOp to be completed within five years.

After several delays, the fourth BiOp was finalized in 2010, and once again found jeopardy and adverse modification from the pollock industry – but this time the BiOp also cited pressure from the mackerel industry. The agencies drafted strong RPAs for pollock and mackerel fishing, and closed the bottom trawl fisheries in January 2011, causing the commercial fisheries to file suit. Mr. Kline noted the irony of the fact that, over a decade later, Greenpeace intervened to support the BiOp against which it had originally instigated litigation. The 14-year litigation saga continues today, as the federal judge has remanded the case and asked the government to draft a new Environmental Impact Statement.

Mr. Kline discussed other exceptions to the ESA and MMPA that are generally granted to the Department of Defense and the offshore oil and gas industry. The Department of Defense has received permission to test and use low-frequency sonar for 10 years, which Mr. Kline expects to impact roughly 10,000 marine mammals per year. The Obama Administration recently permitted offshore oil operations in the Gulf of Mexico to blow up defunct oil platforms despite the presence of roughly 12 whale and dolphin species in the Gulf.

## QUESTIONS AND ANSWERS

*What new technologies are being used to detect violations, and how effective are they? What do we need to focus on next?*

Mr. Tucker discussed improving communication and information-sharing amongst user groups and compliance officers through technological advances, and the rush toward automated solutions such as remote platforms. Mr. Tucker went on to cite oceanographic technologies, such as passive acoustics, that monitor marine species location, movements and migratory patterns as the technologies most likely to yield compliance and conservation benefits in the long run. Mr. Tucker encouraged industry to use new information and tools that can help them to protect marine species and reduce their risk exposure. For example, using improved data, the commercial shipping industry can take advantage of modernized information systems and controls at the helm.

Mr. Dunn discussed the value of vessel monitoring systems. He emphasized that detecting violations is still all about basic police work, including using informants, cameras, and following up on leads. Mr. Webb noted that the DOJ also encourages informants and new video surveillance technology where violators can be taped without knowledge. Oceanographic data depicting where marine species originated and where the take occurs can also help prosecutors.

Mr. Kline described the iPad application developed by NOAA and non-governmental organizations that help mariners locate North Atlantic right whales and recommend vessel speed and route changes. New applications locating blue whales off the West Coast will soon be available.

*How does the size of the penalty affect the prioritization of cases?*

Mr. Webb asserted that real deterrence is not financial, but the loss of liberty in environmental crimes cases. Prosecutors analyze the likelihood that a violator will be incarcerated by applying the transparent factors listed in the discretionary Sentencing Guidelines, generally followed by judges. Both prosecutors and respective agencies rank cases and assign investigators based on the likelihood of incarceration and the penalty tools available.

Mr. Webb noted that prosecutors frequently use civil society resources, and invite members to testify to describe the offense conduct and impact to the court. The testimony helps judges determine the appropriate sentence. Mr. Dunn explained that NOAA OLE, with limited resources, developed investigative priorities and investigates cases that have the greatest impact on protecting living marine resources.

*Do either the ESA or MMPA have a citizen suit provision, enabling citizens to bring suit against alleged violators or the government?*

Mr. Webb answered that the ESA and the Administrative Procedure Act have citizen suit provisions, encouraging citizens to bring adverse litigation and ensure government compliance.

*How does domestic enforcement compare to enforcement in other countries?*

Mr. Webb highlighted the strengths of enforcement in the United States by describing his work for the Association of Southeast Asian Nations (ASEAN) Wildlife Enforcement Network. U.S. agencies have more dedicated investigators, prosecutors, and resources, and leverage strong cooperative relationships between investigators and prosecutors. In contrast, less developed countries often lack good governance and corruption is widespread as violations often go overlooked due to the violator's political connections. Dedicated persons bringing litigation, however, can overcome these limitations.

Mr. Kline added that other nations may not have the basic environmental laws or government necessary to protect the environment. Mr. Kline focused his remarks on the National Environmental Policy Act, which requires agencies to consider the impacts caused to essential habitat and the range of alternative actions. After conducting an Environmental Impact Statement (EIS), the New England Fishery Management Council banned bottom trawlers over 700,000 nautical square miles to protect deep sea

coral habitats in the Exclusive Economic Zone. Mr. Kline recommends environmental groups identify environmental issues and propose alternatives to an agency prior to EIS scoping.

*A seminar participant noted that the ESA does have a citizen suit provision whereas the MMPA does not. This distinction is relevant to expanding the incidental take permit for polar bears to the lower forty-eight states. How do the different definitions of “take” under the ESA and MMPA and the ambiguity of “harassment” affect investigations and prosecutions prioritization?*

Mr. Dunn explained the challenge for OLE in enforcing ambiguous definitions, such as “harassment.” As harassment requires a behavioral change by the species, this raises the additional question of who decides what constitutes a behavioral change. OLE regularly seeks clarity on permitted actions, such as the definition of “feeding.” Mr. Dunn noted that even with clear regulations and enforcement, industry finds ways to avoid compliance; e.g., when enforcement officers began boarding vessels to enforce feeding laws, industry began feeding species underwater to avoid detection.

Mr. Tucker followed by discussing that Coast Guard officers have a range of resources to assist them in determining whether an action constitutes “harassment,” including experts within the Coast Guard, training centers, and NOAA. Protected species enforcement is also generally accompanied by a violation under the Magnuson-Stevens Fishery Conservation and Management Act.

*In other countries, drug enforcement agencies have become involved in protecting marine species and fisheries. Has the Coast Guard been involved in training these foreign drug enforcement agencies? What are some examples of successes?*

Mr. Tucker explained that the LMR Enforcement Program has delivered training in the Pacific and Central America, particularly in cases where there is a conjunction between contraband and fisheries. The Program examines the host country’s boarding laws and sustainable approach to fisheries.

Mr. Dunn later noted that, in Central America, NOAA implements capacity-building for marine protected species policies, such as using Turtle Excluder Devices.

*Has there been any thought about crowdsourcing, such as using iPhone applications to gather information?*

Mr. Dunn stated that NOAA actively seeks opportunities to leverage social media to gather information for enforcement.

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