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April Fisher

Amber A. Bell

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NOTE

DID *UNITED STATES V. HAYASHI* FAIL TO PROVIDE A SAFE HARBOR FOR MARINE MAMMALS UNDER THE MARINE MAMMAL PROTECTION ACT?

I. INTRODUCTION

Dolphins, porpoises, whales, and other marine mammals have been exploited and their existence threatened due in large part to the practices of the fishing industry.¹ The boldest step that the American government has taken thus far to protect marine mammals is its enactment of the Marine Mammal Protection Act of 1972 (hereinafter "MMPA").² Even with the enactment of the MMPA, marine mammals remain unprotected due to lack of enforcement and judicial interpretations that limit the scope of the MMPA.

This note focuses on one such instance where a court erred in interpreting a key term in the MMPA. In *United States v. Hayashi*,³ the Ninth Circuit, sitting *en banc*, found that a fish-

1. When Congress enacted the Marine Mammal Protection Act dolphins and porpoises were endangered, as 250,000 porpoises were being slaughtered by the tuna industry each year. Laura L. Jones, Note, *The Marine Mammal Protection Act and International Protection of Cetaceans*, 22 VAND. J. TRANSNAT'L L. 997, 998-99 (1989). In 1989, 300 dolphins each day were being killed by tuna fishers. *Id.* at 999.

2. David M. Levin, *Towards Effective Cetacean Protection*, 12 NAT. RESOURCES L., 549, 571 (1979).

The MMPA is codified at 16 U.S.C. §§ 1361-1421 (1994).

3. *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (rehearing *en banc*) (per Reinhardt, J., with whom Norris, J., joined; Browning, J., dissenting).

erman who shot at porpoises to deter them from his catch did not commit a "taking" under the MMPA.⁴ The court held that to constitute a criminal "taking" under the MMPA, harassment of a marine mammal must entail direct and serious disruptions of normal mammal behavior.⁵ This decision may result in further exploitation and suffering of marine mammals.

II. BACKGROUND OF THE MARINE MAMMAL PROTECTION ACT

The impact humans have upon marine mammals has "ranged from what might be termed malign neglect to virtual genocide."⁶ Marine mammals have been "shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved."⁷ One of humankind's most harmful impacts upon marine mammals results as a consequence of tuna fishing with purse seines.⁸

In response to these practices, Congress enacted the Marine Mammal Protection Act for the purpose of maintaining marine mammals at healthy population levels.⁹ The MMPA establishes that marine mammals, and the marine ecosystem

4. *Hayashi*, 22 F.3d at 861.

5. *Id.* at 864.

6. H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144.

7. *Id.* at 4144-45.

8. Levin, *supra* note 2, at 551. Purse seine fishing is a procedure in which fishermen use dolphin to catch tuna. Because tuna associate with certain species of dolphin, fishermen look for dolphins to locate the tuna. Once spotted, fishermen herd dolphin and the tuna swimming beneath them into mile-long nets then close the nets around them. Once in the net, most dolphin panic and dive to the bottom where they get caught in the net webbing and drown. Elise Miller, Comment, *The Fox Guarding the Henhouse: Conflicting Duties under the Marine Mammal Protection Act*, 31 SANTA CLARA L. REV. 1063, 1065-66 (1990-91). When the MMPA was enacted, it was estimated that between 200 to 400 thousand porpoises are caught and killed in tuna nets each year. H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4148.

9. H.R. REP. NO. 970, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 6154, 6155.

upon which they depend for survival, require protection from human activities.¹⁰ The MMPA covers all mammals who spend part of their lives in the sea.¹¹ The largest category of animals protected by this act is the Cetaceans, which includes whales, dolphins, and porpoises.¹²

In passing the MMPA, Congress recognized that "man's thumb is already on the balance of Nature," and decent treatment for the marine mammals may well be in the long-term best interests of man.¹³ To achieve this goal, the MMPA prohibits the "taking" of any marine mammal by any person or vessel or other conveyance subject to the jurisdiction of the United States.¹⁴ Under the MMPA, the term "take" is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."¹⁵ The goal of the MMPA is to reduce such takings to insignificant levels and to greatly reduce the mortality and serious injury rate.¹⁶

10. H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4145. Congress found that "certain species and population stocks of marine mammal are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1) (1994).

11. *Id.* at 4148.

12. Levin, *supra* note 2, at 553. Dolphin and porpoises are so similar physiologically, behaviorally and morphologically that the names are used interchangeably. *Id.* at 555. The names will therefore be used interchangeably throughout this note.

13. H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4145.

14. 16 U.S.C. § 1372(a)(1) (1994). The MMPA also prohibits any person from possessing any marine mammal or marine mammal product, from transporting, purchasing, selling, exporting, or from offering to purchase, sell, or export any marine mammal or marine mammal product taken in violation of the Act. 16 U.S.C. § 1372(a)(3) & (4) (1994).

15. 16 U.S.C. § 1362(13) (1994).

16. 16 U.S.C. § 1371(a)(2) (1994). The 1981 Amendment to the MMPA provides that in the case of purse seine fishing for yellowfin tuna the goal of approaching a zero mortality and serious injury rate will be satisfied by "a continuation of the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable." *Id.*

III. FACTS & PROCEDURAL HISTORY

On January 24, 1991, David Hayashi, a part-time commercial fisherman¹⁷ and life-time resident of Hawaii, was fishing for Ahi¹⁸ off the coast of Waianae.¹⁹ As he fished, a group of four porpoises began eating Ahi off his fishing lines.²⁰ Hayashi fired two rifle shots to the immediate rear of the animals in an attempt to deter the porpoises from his catch.²¹ Neither of these shots struck the porpoises.²²

A state enforcement officer witnessed the shots fired by Hayashi and reported the incident to the National Marine Fisheries Service (hereinafter "NMFS").²³ In February 1991, NMFS agents interviewed Hayashi and his son (who had been present on the boat when Hayashi fired at the porpoises) regarding the incident²⁴ and obtained their written statements.²⁵ A criminal information was subsequently filed, charging Hayashi with "knowingly taking a marine mammal" in violation of the MMPA.²⁶

17. *United States v. Hayashi*, 22 F.3d 859, 861. The record does not specify whether Hayashi was engaged in commercial or recreational fishing at the time of this incident. *Id.* at 859-67.

18. *Id.* "Ahi" means tuna in the Hawaiian language. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 44 (1976).

19. *Hayashi*, 22 F.3d at 861. Waianae is off the coast of the Hawaiian island of Oahu. THE NEW YORK TIMES ATLAS OF THE WORLD 135 (3d ed. 1993).

20. *Hayashi*, 22 F.3d at 861. The porpoises were approximately twenty-five yards from the boat. Appellee's Answer Brief at 2, *U.S. v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (No. 91-10044).

21. *Hayashi*, 22 F.3d at 861.

22. *Id.*

23. *Id.* Under the Marine Mammal Protection Act, the Department of Commerce is responsible for whales, dolphins, porpoises, sea lions and seals. Within the Department of Commerce, the National Oceanic and Atmospheric Administration (hereinafter "NOAA") is responsible for the management and protection of marine mammals. NOAA's subordinate agency, the National Marine Fisheries Service, is assigned the responsibilities of research and management of whales, porpoises, dolphin and seals. H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4146.

24. Appellant's Opening Brief at 4, *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (No. 92-10044).

25. *Hayashi*, 22 F.3d at 861.

26. *Id.* Hayashi was charged under § 1371(a)(2)(A) of the MMPA. *Id.* This section of the statute provides that "it is unlawful . . . for any person or vessel or other conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States." 16 U.S.C. § 1372(a)(2)(A)

In July 1991, the state proceeded against Hayashi before a magistrate judge.²⁷ Hayashi unsuccessfully sought dismissal of the charges on a theory that the MMPA, as applied, was unconstitutionally vague.²⁸ A trial ensued, based on the stipulated facts received into the record.²⁹ The magistrate judge convicted Hayashi of intentionally taking marine mammals, as prohibited by the MMPA, and sentenced him to one year of unsupervised probation, together with a \$500 fine.³⁰

Hayashi appealed to the United States District Court for the District of Hawaii, renewing the unconstitutional vagueness argument asserted in his motion to dismiss and raising a claim of insufficient evidence.³¹ The district court affirmed his conviction.³² Hayashi then brought an appeal before the Ninth Circuit Court of Appeals, asserting the same grounds presented before the district court.³³ The Ninth Circuit reversed the conviction, holding that there was insufficient evidence to find a criminal "taking" by "harassment" under the MMPA.³⁴ The court did not reach the issue of unconstitutional vagueness.³⁵

(1994).

27. *Hayashi*, 22 F.3d at 861.

28. *Id.* Specifically, Hayashi argued that the term "harass," as specified in the MMPA and as applied to porpoises, was unconstitutionally vague, thereby rendering the statute void. Appellant's Opening Brief at 5, *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (No. 92-10044).

29. *Hayashi*, 22 F.3d at 861. The facts submitted to the magistrate judge included the Hayashis' written statements and an NMFS agent's report and notes on the interviews of the father and son. *Id.*

30. Appellant's Opening Brief at 1, *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (No. 92-10044). A person who violates the Marine Mammal Protection Act may be assessed a civil or criminal penalty. 16 U.S.C. § 1375 (1994). If a person violates any provision of the Act, or permit or regulation issued thereunder, the Secretary may assess a civil penalty of up to \$10,000 for each violation. 16 U.S.C. § 1375(a)(1) (1994). Further, the Secretary may assess a criminal penalty to a person who *knowingly* violates the MMPA. 16 U.S.C. § 1375(b) (1994). Upon conviction, the criminal violator of the Act may be fined up to \$20,000 for each violation, or imprisoned for up to one year, or both. *Id.* Each unlawful taking is a considered a separate offense. 16 U.S.C. § 1375(a)(1) (1994).

31. *Hayashi*, 22 F.3d at 861.

32. *Id.* The district court did not hear oral argument. *Id.*

33. *Id.*

34. *Id.* at 865.

35. *Hayashi*, 22 F.3d at 861 n.1. Although the Ninth Circuit did not reach Hayashi's vagueness challenge, it noted that the term "harass," as set forth in the MMPA, raises an issue of adequate notice to potential violators. *Id.* at 865 n.14.

IV. COURT'S ANALYSIS

A. MAJORITY OPINION

In *United States v. Hayashi*,³⁶ the Ninth Circuit was asked to determine whether the defendant's act of intentionally shooting in the vicinity of porpoises in an attempt to deter them from eating Ahi off of his fishing line fell within the MMPA's proscription against the "taking" of marine mammals.³⁷ The Ninth Circuit, in its majority opinion, held that the district court, which had affirmed a magistrate judge's conviction of the defendant, committed two errors.³⁸ First, the *actus reus*, or criminal act itself, was improperly defined because the court had relied upon an improper statute to formulate its definition of "take" under the act.³⁹ Second, the *mens rea*, or the mental element for the crime charged, was not properly limited to conduct which was knowing and intentional.⁴⁰ After setting forth and explaining the errors below, the court went on to determine that there was insufficient evidence to convict Hayashi of "knowingly taking" a marine mammal in violation of the MMPA.⁴¹ Thus, the Ninth Circuit reversed Hayashi's conviction.⁴²

36. *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994).

37. *Id.* at 861.

38. *Id.* at 862.

39. *Id.*

40. *Id.* The district court had affirmed Hayashi's conviction under the erroneous belief that negligent conduct was sufficient to support criminal prosecution of Hayashi under the MMPA. While the MMPA authorizes both civil and criminal penalties for violation of its provisions, criminal penalties only apply to persons who "knowingly" violate a provision of the act. In the proceedings below, the parties referred the court to 50 C.F.R. § 17.3, which includes both negligent and intentional acts in its definition of "harass." In so doing, they failed to inform the court that the MMPA requires the defendant to "knowingly" commit the prohibited conduct before criminal liability may attach. The district court's affirmance of Hayashi's conviction rested at least in part upon its misunderstanding of the requisite *mens rea*. While the district court found that "[f]iring the rifle in waters containing porpoises was a negligent act that created a likelihood of injury to the porpoises" they went on to suggest that there was also evidence of Hayashi's intentional attempt to deter the porpoises from his catch. *Hayashi*, 22 F.3d at 862.

41. *Id.* at 865.

42. *Id.* at 861.

1. Statutory Interpretation: Defining the *Actus Reus*

To correctly define the *actus reus* the Ninth Circuit looked first to the statute under which Hayashi had been charged, 16 U.S.C. § 1372(a)(2)(A).⁴³ This statute prohibits the “taking” of a marine mammal in United States waters.⁴⁴ Noting that the MMPA defines “take” as “to harass, hunt, capture, or kill or attempt to harass, hunt, capture, or kill,”⁴⁵ the court determined that only the terms “harass” and “attempt to harass” were potentially applicable to Hayashi’s conduct.⁴⁶ At the time Hayashi committed the act of firing at the porpoises, the term “harass” was not further defined within the MMPA or its companion administrative regulations.⁴⁷ Nevertheless, regulations issued under the Endangered Species Act defining “take” with regard to porpoises were available and utilized by the Ninth Circuit.⁴⁸ These regulations state that the intentional or negligent “disturbing” or “molesting” of a marine mammal constitutes a “take.”⁴⁹ However, the Ninth Circuit Court found these examples of “taking” to be equally vague, and determined that a clearer definition of “taking” by “harassment” was to be ascertained by referring to the context of the statute.⁵⁰

43. *Id.* at 861.

44. 16 U.S.C. § 1371(a)(2)(A) (1994). *See supra* note 26.

45. 16 U.S.C. § 1362(13) (1994).

46. *Hayashi*, 22 F.3d at 861. The government conceded that no other terms within the definition of “take” had possible application to Hayashi’s act of firing shots within the vicinity of porpoises while they were eating fish and bait from his fishing lines. *Id.*

47. *Id.*

48. *Id.* at 863-64 (citing 50 C.F.R. § 216.3 (1994)). 50 C.F.R. § 216.3 defines “take” as to

harass, hunt, capture, collect, kill, or attempt to harass, hunt, capture, collect or kill any marine mammal. This includes, without limitation, any of the following: The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild.

50 C.F.R. § 216.3 (1996).

49. *Hayashi*, 22 F.3d at 864.

50. *Id.*

The term "harass," the court noted, is grouped with "hunt," "capture," and "kill" as forms of prohibited "taking."⁵¹ Relying on the principle that words which are grouped together in a list should be given similar meaning,⁵² the court determined that each of these terms "involve[d] direct and significant intrusions upon the normal, life-sustaining activities of a marine mammal."⁵³ Therefore, the Ninth Circuit concluded that similar to those terms, "harass" must involve a similar level of intrusion.⁵⁴

As additional support for this conclusion, the court next looked to the very regulation, 50 C.F.R. § 17.3, which it determined the magistrate judge and district court had improperly relied upon in formulating their definition of "take."⁵⁵ The court postulated that although § 17.3 implements the Endangered Species Act, a statute distinct and separate from the MMPA, the regulations could nevertheless prove to be useful as analogous authority to aid in interpreting the terms from the MMPA.⁵⁶

Section 17.3 defines "harassment" which constitutes a "taking" to require a significant disruption of "normal behavioral patterns" including breeding, feeding or sheltering.⁵⁷ The

51. *Id.* 16 U.S.C. § 1362(13) (1994).

52. The doctrine of *noscitur a sociis*, a familiar principle of statutory construction, states that if a meaning of a statute is unclear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases. NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.16, at 183 (5th ed. 1992).

53. *Hayashi*, 22 F.3d at 864.

54. *Id.*

55. *Id.*

56. *Id.* The court noted, "section 17.3, issued under the Endangered Species Act, is not the controlling regulatory definition and is an improper starting point for any MMPA prosecution; it is nonetheless analogous authority that is of considerable assistance in interpreting 50 C.F.R. § 216.3." *Id.* Furthermore, the NMFS has itself referred to § 17.3 in interpreting the meaning of "harass" under the MMPA. *Id.* at 864 n.13.

57. *Hayashi*, 22 F.3d at 864. The text of 50 C.F.R. § 17.3 defining harm states

Harm in the definition of "take" . . . means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral pat-

court noted that this definition emphasized protecting “natural” animal behavior, not abnormal marine mammal activity.⁵⁸ This definition, the court held, was consistent with the essence of the MMPA which strove to preserve marine mammals as essential components of the “natural” marine ecosystem.⁵⁹ The court found that § 17.3 did not support an interpretation of “harassment” which prohibits disturbing marine mammals who are endangering human life or property.⁶⁰ Thus the interpretation of “harass” propounded by the court would look at the act of the alleged harasser and also consider the act in which the marine mammal was engaged.⁶¹ A “taking” by “harassment,” according to the majority of the Ninth Circuit, encompassed “only direct and serious disruptions of normal mammal behavior.”⁶²

2. Application of the Court’s Definition of the *Actus Reus* to the Conduct Underlying Hayashi’s Conviction

The Ninth Circuit’s definition of the *actus reus* limited criminal conduct to “direct and serious disruptions of normal mammal behavior.”⁶³ In reviewing the conduct of Hayashi, the court bifurcated its analysis, looking first at whether the mammals at issue had been disrupted from “normal” behavior, and subsequently at the reasonableness of Hayashi’s conduct.⁶⁴

terns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3 (1996).

58. *Hayashi*, 22 F.3d at 864.

59. *Id.*

60. *Id.* at 865.

61. *Id.*

62. *Id.* at 865. The court suggested that the lower courts had given the term “harass” too broad a definition, and “in the absence of [their] appropriately restrictive construction of the MMPA and its regulations, ‘harass’ would raise a serious issue of adequate notice to potential violators.” *Id.* at 865 n.14.

63. *Id.* at 865.

64. *Id.*

a. *The Requirement that "Normal" Behavior Patterns Be Disrupted*

At the moment Hayashi fired shots at the porpoises, the animals were eating bait and hooked fish from his fishing lines.⁶⁵ Eating fish and bait off a fisherman's lines, the majority asserted, was "not a part of the porpoise's normal eating habits."⁶⁶ Furthermore, no evidence was presented establishing that the animals had in fact been deterred from the lines or even reacted to Hayashi's shots.⁶⁷ Thus, the Ninth Circuit concluded that the evidence failed to establish that Hayashi's shots had deterred the porpoises from "normal" behavior patterns.⁶⁸

b. *The Requirement of a "Direct and Serious" Disruption*

With regard to the requirement that the defendant's conduct result in a direct and serious disruption, the court summarily stated that "Hayashi's conduct was not the kind of direct, serious disruption of a porpoise's customary pursuits required to find a criminal 'taking.' Reasonable acts to deter porpoises from eating fish or bait off a fisherman's line are not criminal under the MMPA."⁶⁹

Thus, having found that there was no "direct and serious disruption of normal mammal behavior," the Ninth Circuit concluded that the MMPA and the regulations implementing the Act failed to reach Hayashi's conduct.⁷⁰

65. *Id.*

66. *Id.*

67. *Hayashi*, 22 F.3d at 865. The majority noted, however, that any diversion from eating off Hayashi's lines was not required to constitute a "taking" under the MMPA. *Id.*

68. *Id.*

69. *Id.* The court emphasized in a footnote that the reasonableness of deterrent steps depends upon their impact on the mammal. *Id.* at 865 n.15.

70. *Hayashi*, 22 F.3d at 865.

3. Squaring the Court's Interpretation with Subsequent Regulations Proscribing the Feeding of Marine Mammals

Subsequent to the incident for which Hayashi was prosecuted, the NMFS promulgated regulations adding "feeding or attempting to feed" to the definition of "harass" found in 50 C.F.R. § 216.3.⁷¹ This amendment to the definition of "harass" addressed concerns that people feeding marine mammals disrupts their natural feeding patterns, potentially conditioning them to approach watercraft, and thereby increasing the likelihood "that they will become entangled in fishing gear, be struck by vessels, or be shot, poisoned, or fed foreign objects."⁷² The court determined that this amendment deterred precisely that behavior which Hayashi had himself deterred by firing the rifle shots.⁷³ The court concluded that were it to hold that Hayashi's behavior constituted "harassment," then under the new regulations, a fisherman would be guilty of "harassment" by "feeding" if he did not deter a marine mammal from feeding off of his fishing lines.⁷⁴ But at the same time, a fisherman would be guilty of "harassment" by "disturbing" if he took steps to deter such acts.⁷⁵ For these reasons, the court concluded, the new regulation supported their definition of "harass" as well as their interpretation that the MMPA did not reach Hayashi's conduct.⁷⁶

B. DISSENT

Judge Browning dissented from the analysis and conclusions of the majority, finding that they represented both bad

71. *Id.* (referring to 56 Fed. Reg. 11693 (1991) which became effective April 19, 1991).

72. *Id.* at 866 (citing 56 Fed. Reg. 11693, 11695 (1991)).

73. *Hayashi*, 22 F.3d at 866.

74. *Id.*

75. *Id.* However, the dissent argues that the majority presented a false "fisherman's dilemma." Judge Browning asserts 50 C.F.R. § 216.3 only regulates "intentional" feeding of marine mammals, and exempts unintentional, incidental feeding. Since the fisherman would be fishing for tuna for human consumption, not to feed to the porpoises, Browning argues that this provision would not apply to the conduct because the feeding of the porpoises would be unintentional. *Id.* at 869 n.6.

76. *Id.* at 866.

law and bad policy.⁷⁷ He stated that the goal of the Marine Mammal Protection Act is the "optimal protection" of marine mammals from human activities which threaten their survival.⁷⁸ Thus, he would not limit the scope of the MMPA to human activity which results in the certain physical destruction or injury of marine mammals.⁷⁹ Rather, Judge Browning found the MMPA expressed a sweeping statement of public policy and was intended by Congress to regulate a wide variety of human activity, including those activities which create the "mere potential" for harm.⁸⁰ In Browning's view, "taking" under the MMPA encompassed Hayashi's act of intentionally firing rifle shots into the water near porpoises which were feeding from bait and tuna hooked on fishing lines.⁸¹ Browning would affirm Hayashi's conviction.⁸²

1. A Broad Definition of "Take" is Necessary to Effect Congressional Intent

Judge Browning argued that Congress intended "taking" to be broadly defined.⁸³ He claimed that as a key jurisdictional term within the act, its "cramped" construction would "restrict most aspects of the scheme envisioned by Congress for the protection of marine mammals."⁸⁴

Browning pointed out that the MMPA's substantive provisions commence with an absolute moratorium on the "taking" of marine mammals.⁸⁵ The Secretary is delegated the authority to regulate both public and private conduct falling within

77. *Hayashi*, 22 F.3d at 871.

78. *Id.* at 867 (citing to 1972 U.S.C.C.A.N. at 4148).

79. *Id.*

80. *Id.* The adopted legislation was constructed with conservation in mind. The Committee on Merchant Marine and Fisheries indicated that the "legislation should be adopted to require that we act conservatively. . . . [N]o steps should be taken regarding [endangered marine mammals] that might prove to be adverse or even irreversible in their effects until more is known." H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4148.

81. *Hayashi*, 22 F.3d at 867.

82. *Id.* at 866.

83. *Id.* at 867.

84. *Id.*

85. *Id.* See 16 U.S.C. § 1371(a) (1984).

this moratorium; his power is confined by the meaning assigned to the term.⁸⁶

When "take" is read restrictively, as it is under the majority's formulation, the scope of activities encompassed within the Act's prohibitions is limited, as is the Secretary's power to protect endangered marine mammals.⁸⁷ Judge Browning asserted that such a construction would be inconsistent with Congress's stated intent to provide "optimal" marine mammal protection.⁸⁸ On the other hand, Browning countered, a broad definition of "take" allows the necessary flexibility for effective administration and is consistent with protections envisioned by Congress.⁸⁹

2. The Statutory Language, Legislative History, and Secretary's Determinations Support the Broad Interpretation of "Taking" by "Harassment" under which Hayashi's Conduct Is Proscribed

Judge Browning next looked to the MMPA, its companion regulations, and the Secretary's interpretation of the term "taking."⁹⁰ He concluded that these sources supported an interpretation of "take" sufficiently broad to encompass Hayashi's conduct.⁹¹

Noting, as had the majority, that "take" is defined by the terms "harass," "hunt," "capture," and "kill," Browning deter-

86. *Hayashi*, 22 F.3d at 866-67. The Secretary may prohibit conduct which is harmful to the marine mammals as well as develop and encourage means of ensuring their survival. The areas that will be affected by the majority's narrow construction of the term "taking" include the Secretary's research into methods of fishing that minimize the incidental "taking" of marine mammals (16 U.S.C. §§ 1380-1381), the reported incidental "takings" by vessels that have received exemptions to provide information on the effect of fishing techniques on marine mammals (16 U.S.C. § 1383a(c),(g)), and the Marine Mammal Commission's continuing review of humane means of "taking" marine mammals (16 U.S.C. § 1402(a)(2)). *Id.* "Secretary" refers to the Secretary of Interior and the Secretary of Commerce. *Id.* at 866 n.1.

87. *Id.*

88. *Id.* at 867.

89. *Hayashi*, 22 F.3d at 867.

90. *Id.* at 867-69.

91. *Id.* at 867.

mined that Congress had intended to regulate human contact with marine mammals, "progressing in severity" from mere "harassment" to the ultimate destruction, the "killing" of the mammal.⁹² "Harass," he found, was not intended to be submerged into a singular meaning encompassing the whole of the statutory phrase.⁹³ It must, he concluded, be read to broaden the definition of "taking" and the scope of the Act itself.⁹⁴

In support of this conclusion, Judge Browning noted that Congress had previously identified the "intentional pursuit of marine mammals" and the use of "acoustic deterrent devices" as "takings" by "harassment" proscribed by the Act.⁹⁵ Furthermore, turning to 50 C.F.R. § 216.3, Judge Browning cited regulatory examples of "taking," including the mere restraint or tagging of a marine mammal. He found these to be inconsistent with the majority's assertion that "harassment" contemplates only "direct and significant intrusions" upon "normal" mammal behavior.⁹⁶

Finally, Judge Browning reviewed exemptions and exceptions to the Act's broad proscriptions.⁹⁷ He concluded that the parties involved in enactment and administration of the Act, as well as the parties governed by the Act, viewed "taking" as a broad concept, one broad enough, he asserted, to encompass

92. *Id.*

93. *Id.*

94. *Hayashi*, 22 F.3d at 868. Judge Browning's conclusion that "harass" must significantly add to the definition of take is premised at least in part upon the fact that Congress had rejected a proposal to define "take" in terms which differed only in the absence of "harass" and inclusion of "wound." *Id.*

95. *Id.*

96. *Id.* at 869. Judge Browning was concerned not only with the majority's narrowing of the definition of "taking" here, but also with the "elusive concept" of "normal marine mammal behavior," which is not mentioned in the Act or its legislative history and will require courts and regulators to develop a system of rules from which to determine exactly what behavior the majority is referring to. In addition, Judge Browning challenged the majority's suggestion that a porpoise's feeding off of fishing lines constituted "unnatural" or "abnormal" behavior. He argued that by excluding such behavior from the protections of the MMPA the majority denied marine mammals protection from harm arising out of human fishing activity, a primary purpose of the Act. *Id.* at 868-69.

97. *Hayashi*, 22 F.3d at 868.

the conduct of Hayashi and support his criminal conviction.⁹⁸

Noting that the Secretary's authority includes discretionary approval of permit applications which include "takings" otherwise prohibited by the Act, Browning observed that permits were regularly requested and granted, authorizing conduct "no more intrusive" than photographic identification, vessel approach, and the broadcast of underwater acoustic recordings.⁹⁹ Apparently, he concluded, the Secretary and the fishermen subject to this legislation considered such conduct to be within the Act's broad proscriptions.¹⁰⁰

Judge Browning also identified an exemption for commercial fishermen, allowing them to register with the Secretary for permission to intentionally "take" marine mammals in order to protect their catch, gear, or persons during the course of commercial fishing operations.¹⁰¹ This exemption, he asserted, could only exist if such conduct were prohibited by the Act.¹⁰² Browning argued that on its face, this exemption established that Hayashi's act of firing a rifle to scare away scavenging dolphins to defend his fishing catch fell within the MMPA's proscriptions.¹⁰³

V. CRITIQUE

The majority erred by narrowly defining "harassment" under the MMPA to include only those acts which directly and seriously disrupt normal marine mammal behavior.¹⁰⁴ The contention that "harass" should be more broadly interpreted is supported by clear statutory language, the legislative history of

98. *Id.* at 869.

99. *Id.* at 868.

100. *Id.*

101. *Id.* at 870. Judge Browning noted that some loss of marine mammal life was inevitable in commercial tuna fishing operations. To protect this industry, the Congressional exemption provides a "restraining system of permits and regulations administered by the Secretary" which limits injury to the animals without destroying commercial fishing enterprises. *Hayashi*, 22 F.3d at 870.

102. *Id.*

103. *Id.*

104. *United States v. Hayashi*, 22 F.3d 859, 866 (9th Cir. 1994) (Browning, J., dissenting).

the MMPA, and the Secretary's regulations enforcing and interpreting the Act.¹⁰⁵ Furthermore, the majority erroneously employed the doctrine of *noscitur a sociis* when defining the term "harass." Consequently, the majority failed to give effect to the expressed intent of Congress by not giving "harass" its independent meaning as Congress intended.¹⁰⁶

A. THE PLAIN MEANING OF "HARASS" SUPPORTS THE CONTENTION THAT SHOOTING AT PORPOISES CONSTITUTES A "TAKING" UNDER THE MMPA

The starting point in statutory interpretation is to look at the plain language of the statute.¹⁰⁷ As the MMPA defines the term "take" to include the harassment of marine mammals, it is appropriate to look at the plain meaning of the term "harass" to determine its meaning under the MMPA.¹⁰⁸ One way to determine the plain meaning of a word is to look at the dictionary.¹⁰⁹ Webster's New Collegiate Dictionary defines "harass" as "to worry or impede by repeated raids" or "to annoy persistently."¹¹⁰

Hayashi's firing two successive rifle shots at porpoises fits within the common definition of "harass."¹¹¹ Porpoises, as highly intelligent mammals, would feel worried or annoyed when in the close vicinity of rifle shots.¹¹² Thus, as Congress included "harassment" as a prohibited form of "taking"¹¹³ and as Hayashi's actions toward the porpoises clearly fall within

105. See *infra* parts V.A., V.B., and V.C.

106. SINGER, *supra* note 52, § 46.03, at 94. "The courts owe fidelity to the will of the legislature. What the legislature says in the text of the statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.*

107. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 56 (1987) (citing Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). See Washington Pub. Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883, 885-86 (9th Cir. 1993).

108. 16 U.S.C. § 1362(13) (1994).

109. Babbitt v. Sweet Home Chapter of Communities For A Great Oregon, 115 S. Ct. 2407, 2412 (1995).

110. WEBSTER'S NEW COLLEGIATE DICTIONARY 517 (1980).

111. See *infra* text accompanying notes 112-114.

112. See *infra* notes 125-130 and accompanying text.

113. See *supra* note 15 and accompanying text.

the plain meaning of harassment, Hayashi's conduct violated the MMPA.¹¹⁴

B. THE LEGISLATIVE HISTORY OF THE MMPA SUPPORTS THE CONTENTION THAT HAYASHI'S ACTIONS CONSTITUTED A "TAKE" UNDER THE MMPA

A broad definition of "harass" is supported by the legislative history of the Marine Mammal Protection Act.¹¹⁵ In the MMPA, Congress broadly defined "take" as "including harassing, hunting, capturing or killing any marine mammal or attempting to do so."¹¹⁶ The term harass was included to broaden the scope of protections afforded to marine mammals, thereby ensuring the effectiveness of the MMPA.¹¹⁷ This is evidenced by Congress's statement: "The definition of taking . . . includes the concept of harassment, and it is intended that this term be construed *sufficiently broadly*. . . ."¹¹⁸

Additional examples of "taking" recognized by Congress in the legislative history also support the contention that the term "harass" is to be broadly defined.¹¹⁹ Congress identified the "intentional pursuit" of a marine mammal, the "use of acoustic deterrence devices," and the "operation of motor boats" as examples that would "clearly constitute harassment."¹²⁰ It is hard to reconcile how use of an acoustic deterrence device

114. See *supra*, text accompanying notes 111-113.

115. See *infra* notes 116-121 and accompanying text. The Supreme Court often uses legislative history to assist in statutory interpretation. See *Babbitt v. Sweet Home Chapter of Communities For a Great Oregon*, 115 S. Ct. 2407 (1995); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

116. 16 U.S.C. § 1362(13) (1994); H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4155.

117. *Hayashi*, 22 F.3d at 867 (Browning, J., dissenting).

118. *Hayashi*, 22 F.3d at 867 (Browning, J., dissenting) (quoting H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4150) (emphasis added). Further, arguing that the definition of "take" was too broad, the Commerce Department proposed an alternative definition that purposefully omitted the term "harass." Congress however, rejected this proposal. *Id.* at 868.

119. *Id.*

120. H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4155; H.R. REP. NO. 970, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 6154, 6164.

"clearly constitutes harassment" yet, firing rifle shots in the vicinity where porpoises are swimming does not.

Congress' intent that "harass" be "construed sufficiently broadly" and the examples of actions that constitute harassment establish that Hayashi's act of shooting at the porpoises clearly falls within Congress' intended definition of "harassment" and thus, is a "taking" under the MMPA. This interpretation of "harass" is consistent with Congress' desire that "porpoises be given every reasonable protection."¹²¹

C. REGULATIONS DEFINE "TAKE" BROADLY TO INCLUDE ACTS THAT DISTURB OR MOLEST MARINE MAMMALS - FIRING AT PORPOISES SHOULD CONSTITUTE A "TAKE" UNDER THE MMPA

The regulations issued by the National Marine Fisheries Service that are applicable to the MMPA¹²² offer additional support to the contention that Hayashi's violent acts toward the porpoises violated the MMPA.¹²³ Although these regulations do not define the term "harass," the regulations do define "take," at 50 C.F.R. § 216.3, to include "the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal."¹²⁴

Studies on the cerebral cortex of Cetaceans show that porpoises are highly intelligent mammals.¹²⁵ The functions of the brain associated with "intelligence" are controlled within the cerebral cortex.¹²⁶ A high degree of convolution of the cerebral cortex connotes a high degree of cerebral functioning.¹²⁷ Studies reveal that the cerebral cortex of all Cetaceans

121. H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4148.

122. *See, e.g.*, 50 C.F.R. § 216 (1996).

123. *See infra* notes 124-34 and accompanying text.

124. 50 C.F.R. § 216.3 (1995). *See supra* note 48.

125. Levin, *supra* note 2, at 557.

126. *Id.* The cerebral cortex is responsible for recording the changes in the external and internal environments, evaluating the environment on the basis of needs and experiences, and initiating motor activity to respond to the internal and external environments, as well as thinking, memory, and language. *Id.*

127. *Id.* A high degree of convolution of the cerebral cortex increases the surface area of the cortex. *Id.*

is more convoluted than a human's.¹²⁸ Thus, if cortically mediated behavior is an adequate measure of intelligence, the similarity between the human cortex and the Cetacean cortex is indicative of high Cetacean intelligence.¹²⁹ Therefore, just as a human would be "disturbed" or feel "molested" if shot at, the porpoises swimming in the vicinity of Hayashi's shots would also feel disturbed and molested.¹³⁰ Since he disturbed the porpoises, Hayashi's actions fell within the regulatory definition of "take," thereby violating the MMPA.

The regulations in 50 C.F.R. § 216.3 also call into question the majority's holding that "harassment" must entail a "direct and significant intrusion . . . upon the normal, life-sustaining activities of a marine mammal."¹³¹ However, the Code of Federal Regulations § 216.3 states that a detention "no matter how temporary" constitutes a "taking" under the MMPA.¹³² The term "no matter how temporary" does not indicate a "direct and significant intrusion." Further, the majority's assertion that "harassment" must entail an intrusion upon a "*life-sustaining activity*"¹³³ is in direct conflict with 50 C.F.R. § 216.3, which states that the "collection of a dead animal" constitutes a "taking" under the MMPA.¹³⁴ By limiting "harassment" to activities that result in a "direct and significant intrusion upon the normal, life-sustaining activities," the majority ignored the broad meaning given to "take" by the administrative regulations implementing and interpreting the MMPA.

128. Levin, *supra* note 2, at 557.

129. *Id.* at 558.

130. As the cerebral functions include thinking, as well as recording changes in, evaluating, and adjusting motor activity to respond to the internal and external environments, see Levin, *supra* note 2, we may infer that highly intelligent cetaceans are disturbed by acts of violence directed toward them, such as Hayashi's conduct of shooting a rifle in their direction.

131. *Hayashi*, 22 F.3d at 868 (Browning, J., dissenting).

132. 50 C.F.R. § 216.3 (1996).

133. *Hayashi*, 22 F.2d at 866.

134. See 50 C.F.R. § 216.3 (1996).

D. A BROAD INTERPRETATION OF "HARASS" IS SUPPORTED BY THE PERMITS ISSUED BY THE SECRETARY UNDER THE MMPA

As noted by Justice Browning in his dissent, the broad scope of "taking" is evidenced by the permits issued to allow conduct no more intrusive than Hayashi's shooting in the vicinity of porpoises.¹³⁵ The MMPA prohibits all taking of marine mammals with specified exceptions.¹³⁶ Under the MMPA, the Secretary's authority includes discretionary approval of permit applications, authorizing conduct that constitutes "harassment."¹³⁷ Exercising this power, the Secretary issued permits authorizing "vessel approach, helicopter photogrammetry and photographic identification."¹³⁸ It is hard to reconcile how these activities have a "direct and significant" impact upon marine mammals, but firing rifle shots near porpoises would not.

E. THE NINTH CIRCUIT ERRED IN EMPLOYING THE DOCTRINE OF *NOSCITUR A SOCIIS* TO DETERMINE THE MEANING OF "HARASS" UNDER THE MMPA

By applying the doctrine of *noscitur a sociis*,¹³⁹ the Ninth Circuit narrowly interpreted the term "harass" under the MMPA.¹⁴⁰ The Ninth Circuit erred by employing this doctrine for two reasons. First, the doctrine is employed only when the legislative intent or meaning of the statute is unclear.¹⁴¹ However, the legislative intent of including "harassment" as a form of "take" is not unclear or ambiguous.¹⁴² Congress stat-

135. *Hayashi*, 22 F.3d at 868 (Browning, J., dissenting).

136. *Id.*

137. 16 U.S.C. § 1371(a)(3)(A) (1994). Section 1371(a)(3)(A) states in relevant part: "The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed . . . to determine when . . . to waive the requirements of this section so as to allow taking . . . and . . . issue permits." *Id.*

138. *Hayashi*, 22 F.3d at 868 (citing 58 Fed. Reg. 41458 (1993)).

139. The doctrine of *noscitur a sociis* states that if a meaning of a statute is unclear, "the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases." SINGER, *supra* note 52, § 47.16, at 183.

140. *Hayashi*, 22 F.3d at 868 (Browning, J., dissenting).

141. SINGER, *supra* note 52, § 47.16, at 183.

142. See *supra* section V.B.

ed that "harassment" is to be "construed sufficiently broadly" so that "porpoises [are] given every reasonable protection."¹⁴³ Second, *noscitur a sociis* may only be used when the clear meaning of the word is doubtful.¹⁴⁴ As the plain meaning of "harass" may be found in the dictionary, its meaning is not doubtful.¹⁴⁵

Thus, as Congress' intent is unambiguous and the meaning of "harass" is not doubtful, the majority incorrectly applied the doctrine of *noscitur a sociis* to determine the meaning of "harass" within the MMPA.¹⁴⁶

The Ninth Circuit's error in employing the doctrine of *noscitur a sociis* is further evidenced by a recent Supreme Court decision.¹⁴⁷ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*¹⁴⁸ involved a dispute over whether logging activities that would kill or injure an endangered species amounted to "harm" to the species resulting in a "taking" under the Endangered Species Act (hereinafter "ESA").¹⁴⁹ The Supreme Court declined to invalidate the Secretary of the Interior's regulation, finding that the Secretary has reasonably construed the term "harm" under the ESA.¹⁵⁰

In considering the lower court's decision, the Supreme

143. *Hayashi*, 22 F.3d at 868 (Browning, J., dissenting) (quoting H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4150); H.R. REP. NO. 707, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4148.

144. SINGER, *supra*, § 47.16, at 183.

145. See *supra* note 110 and accompanying text.

146. Rules of construction are employed to "illuminate the intent of the drafters; when the rule conflicts with other, clearer indications of intent, its results should be ignored." *Hayashi*, 22 F.3d at 868 n.3 (Browning, J., dissenting) (quoting *Leslie Salt Co. v. United States*, 896 F.2d 354, 359 (9th Cir. 1990)).

147. *Babbitt v. Sweet Home Chapter of Communities for Great Oregon*, 115 S. Ct. 2407 (1995).

148. 115 S.Ct. 2407 (1995).

149. Kenneth J. Plante et al., *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: Preserving the "Critical Link" Between Habitat Modification and the "Taking" of an Endangered Species*, 20 NOVA L. REV. 747, 776 (1996).

The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1994).

150. *Babbitt*, 115 S. Ct. at 2412.

Court held that the Ninth Circuit erred in applying the doctrine of *noscitur a sociis*.¹⁵¹ The Supreme Court found that by employing this doctrine the Ninth Circuit had denied the word "harm" its independent meaning.¹⁵² The Court explained that, due to its statutory context, Congress meant the term "harm" to serve a specific purpose by including it in the ESA.¹⁵³ The Court held that "harm" is distinct from the other words used to define "take" and the Ninth Circuit erred by employing *noscitur a sociis* because it essentially gave "harm" the same meaning as the other words in the definition.¹⁵⁴

Just as the Supreme Court in *Babbitt* held that the doctrine of *noscitur a sociis* was incorrectly applied to determine the meaning of "harm" under the ESA,¹⁵⁵ the Ninth Circuit erred in applying the doctrine to determine the meaning of "harass" under the MMPA.¹⁵⁶ In employing such a doctrine, the majority looked to the other words that constitute a "take" under the MMPA, such as "hunt," "capture," or "kill," without giving "harass" its own independent meaning.¹⁵⁷ The statutory context of "harass," as set forth in the MMPA, suggests that Congress meant the term to serve a specific function in the MMPA.¹⁵⁸ Using the *Babbitt* analysis, the legislative intent must be given meaning.¹⁵⁹ Therefore, the majority incorrectly applied the doctrine of *noscitur a sociis* to determine the meaning of "harass" and failed to acknowledge the legislative intent behind the MMPA.

151. *Id.* at 2415.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Hayashi*, 22 F.3d at 868 (Browning, J., dissenting).

157. *Hayashi*, 22 F.3d at 864. The majority declares that because "harass" is a "very general term" it is necessary to look to its context to ascertain its meaning. *Id.* The majority then states that since "words grouped in a list should be given related meaning," we look to the other statutory and regulatory examples of "taking." *Id.*, (quoting *Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312, 322 (1977)). In deciding that "hunt," "capture," and "kill" are words that have a certain level of intrusiveness on marine mammals, "[harassment] must entail a similar level of direct intrusion." *Id.*

158. See *supra* notes 115-21 and accompanying text for a discussion of the legislative intent in including the term "harass" in the MMPA.

159. *Hayashi*, 22 F.3d at 868 n.3 (Browning, J., dissenting).

F. THE PROPOSED GUIDELINES TO THE MMPA'S 1994 AMENDMENTS ESTABLISH THAT CONGRESS INTENDED TO PROHIBIT THE TYPE OF CONDUCT PERFORMED BY HAYASHI

In 1994, Congress amended certain provisions of the MMPA.¹⁶⁰ Specifically, Congress added an amendment to prohibit certain deterrent techniques used by fishermen that have a significant adverse impact on marine mammals.¹⁶¹ As part of the 1994 Amendments, Congress directed the NMFS to develop and publish a list of guidelines on how fishermen could safely deter marine mammals.¹⁶² The proposed guidelines prohibit the use of firearms and other devices that propel injurious projectiles for deterrent purposes, as their use has a significant adverse effect on the targeted marine mammals.¹⁶³ Before these proposed guidelines are adopted, they must first be submitted to individuals who have experience and knowledge of interactions with marine mammals and the use of deterrence devices.¹⁶⁴ However, if approved, the act of shooting a firearm where porpoises are swimming as a deterrent method would violate the MMPA.¹⁶⁵ These amendments

160. The Supreme Court has stated that when Congress acts to amend a statute, it presumes Congress "intends its amendment to have substantial effect." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2414 (1995) (quoting *Stone v. INS*, 115 S. Ct. 1537, 1545 (1995)).

161. 16 U.S.C. § 1371 (a)(4) (1994).

162. 16 U.S.C. § 1371 (a)(4)(B) (1994); Taking and Importing of Marine Mammals; Deterrence Regulations and Guidelines, 60 Fed. Reg. 22345 (1995).

163. Taking and Importing of Marine Mammals; Deterrence Regulations and Guidelines, 60 Fed. Reg. 22345, 22346 (1995).

164. *Id.* Section 101(a)(4) requires that NMFS consults with appropriate experts on the implementation of the deterrence provisions. NMFS has compiled a list of individuals believed to have experience and knowledge of marine mammals and the use of deterrence devices. These individuals have been sent a copy of this proposed rule and asked by NMFS to submit comments on this proposed rule. *Id.*

165. *Id.* In discussing the prohibition of firearms for deterrent purposes, the NMFS referred to incidents where fishermen used firearms against marine mammals. *Id.* For example, the Alaska Prince William Sound fishery used firearms to deter killer whales from damaging its catch and gear. Taking of Marine Mammals Incidental to Commercial Fisheries, 59 Fed. Reg. 45263, 45264 (1994). Three killer whales from the relevant pod were lost during 1985, three in 1986, one in 1987 and one in 1988. *Id.* Furthermore, several whales in the pod showed evidence of bullet wounds. *Id.* The deaths of the animals were believed to be the result of intentional takes by participants in the fishery. *Id.*

give further support to the contention that Congress intended "harass" to be broadly interpreted to encompass violent acts such as Hayashi's.

VI. CONCLUSION

By narrowly defining what constitutes "harm" under the MMPA, the Ninth Circuit ignored the plain meaning of the term, the legislative history of the MMPA and the regulations interpreting the MMPA.¹⁶⁶ The Ninth Circuit's holding in *Hayashi* allows fishermen to harass marine mammals as long as the action does not seriously disrupt normal marine mammal behavior. Based on this holding, fishermen can intentionally shoot at mammals to save their catch without any liability under the MMPA. One must question whether this is the "protection from human activities" that Congress envisioned when it enacted the Marine Mammal Protection Act.

*April Fisher**

*Amber A. Bell***

Additionally, in assessing the frequency of "takes" of marine mammals by fisheries, the Department of Commerce reported that, based on congressional guidance, the chasing away of killer whales by fishermen to deter the mammals from catch and gear constitutes harassment under the MMPA. Taking of Marine Mammals Incidental to Fishing Operations, 59 Fed. Reg. 43818, 43819 (1994).

166. See *supra* part V.

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