

# United States Laws and Regulations Applicable to U.S. Citizens and U.S. Activities in Antarctica

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## INTRODUCTION

The United States neither claim nor recognize claims to sovereignty over any part of the Antarctic Treaty Area, the lands and ice shelves south of 60 degrees South Latitude. Thus, U.S. laws are applicable to U.S. citizens and governmental and non-governmental activities south of 60 degrees South Latitude in much the same way that they are applicable to U.S. citizens and activities on the high seas.

At least four U.S. laws and related implementing regulations are applicable to activities conducted south of 60 °S by U.S. citizens and government and non-governmental organizations. They are the National Environmental Policy Act (NEPA), the Antarctic Science, Tourism, and Conservation Act (ASTCA), the Marine Mammal Protection Act (MMPA), and the Endangered Species Act (ESA).

## THE NATIONAL ENVIRONMENTAL POLICY ACT

This Act applies to all major, discretionary federal government activities that could have significant adverse impacts on the natural environment. It does not apply to non-governmental activities. Covered activities include funding of, and issuing permits for, scientific research. The basic purpose of the Act is to insure that the possible environmental consequences of federal activities are identified and taken into account early in the decision-making process. When significant environmental impacts are a possibility, it requires that impact assessments are to be conducted and that possible alternatives to the planned activity, including the no-action alternative, to be identified and considered. The purposes and requirements of the Act are functionally equivalent to those set out in Article 8 and Annex 1 of the Protocol on Environmental Protection to the Antarctic Treaty.

## THE ANTARCTIC SCIENCE, TOURISM, AND CONSERVATION ACT

This Act implements the provisions of the Protocol on Environmental Protection to the Antarctic Treaty. It applies to all U.S. government and non-governmental activities in the Antarctic Treaty Area for which advance notice is required under the provisions of the Antarctic Treaty. Among other things, the Environmental Protocol prohibits the taking of, or harmful interference with, any species of bird, mammal, or plant native

to the Treaty Area, except in accordance with a permit issued by an appropriate national authority. The Protocol defines "take" or "taking" to mean "to kill, injure, capture, handle, or molest a native mammal or bird, or to remove or damage such quantities of native plants that their local distributions or abundance would be significantly affected." Permits may be issued only to authorize (a) collection of specimens for purposes of scientific research and education, and (b) taking or harmful interference incidental to scientific research and construction and operation of support facilities for scientific research. In no case can the authorized taking or interference jeopardize the survival or recovery of a specially protected species or population, or be greater than the number that can be replaced by natural reproduction in the following year. Under the ASTCA, the U.S. National Science Foundation is responsible for issuing permits authorizing the taking of, and harmful interference with, flora and fauna in Antarctica, and for insuring that recipients comply with the terms and conditions of the permits.

The National Science Foundation also is responsible under the ASTCA for assessing the possible environmental impacts of U.S. scientific research and related support operations in the Antarctic Treaty Area. Likewise, the Foundation is responsible for insuring that any environmental impacts are minimized and acceptable - e.g., are consistent with the objectives of the Environmental Protocol and applicable U.S. laws and regulations. To meet this responsibility, the program managers in the Foundation's Office of Polar Programs routinely review research proposals and proposals for new or significant changes in scientific support facilities and operations to determine the likelihood and nature of possible environmental impacts. If this initial evaluation indicates that the activity is likely to have little or no environmental impact, the proposed action may proceed without further environmental evaluation. If it indicates that the proposed action could have a significant - more than a minor or transitory - environmental impact, a formal environmental assessment is done in accordance with the provisions of the National Environmental Policy Act.

An environmental assessment is a written document, equivalent to an Initial Environmental Evaluation required in accordance with Annex 1 of the Environmental Protocol. If the environmental assessment results in a finding of no significant impact (a FONSI) - equivalent to a finding of minor or transitory impact under the Environmental Protocol -, the proposed action may proceed without further environmental evaluation. If either the initial environmental evaluation or the environmental assessment indicates that the proposed action is likely to have significant environmental impacts, an envi-

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ronmental impact statement (EIS) must be done. This is equivalent to a Comprehensive Environmental Evaluation (CEE) required by the provisions of Annex 1 of the Environmental Protocol. Among other things, the EIS or CEE must identify and consider the environmental impacts of possible alternative to the proposed action, including the advantages and disadvantages of the no-action alternative. Further a draft of the document must be made available to the public and to the Antarctic Treaty Parties for comment, and comments must be summarized and addressed in the final document. If an EIS or CEE is done to assess the possible environmental impacts of scientific research or related support operations, the Foundation must prepare and make public a record of decision indicating the alternatives that were considered and the basis for its decision to proceed or not to proceed with the proposed action or an alternative.

If an environmental assessment or impact statement was done previously for a comparable activity in the same or similar area, an abbreviated assessment can be done, incorporating the earlier assessment by reference. Further, the responsible regulatory agency may establish a categorical exclusion for classes of actions that it has determined unlikely to have significant environmental impacts. If a categorical exclusion applies to a proposed action, an environmental assessment or impact statement need not be prepared, unless exceptional circumstances apply - e.g., there is a scientific controversy concerning the nature or significance of the possible environmental impacts or the proposed action is novel or precedent-setting.

#### THE MARINE MAMMAL PROTECTION ACT OF 1972

This Act established a moratorium on the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas. The term "take" is defined in the Act to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." The Act provides that permits may be issued to take marine mammals for purposes of scientific research, public display, and enhancement of depleted stocks. It also provides that taking of small numbers of marine mammals incidental to offshore oil and gas development, oceanographic research, and other activities may be authorized if the taking will have negligible effects on the affected species or stocks and the responsible regulatory agency promulgates regulations or otherwise specifies how and how many marine mammals may be taken, and sets forth requirements for monitoring and reporting the authorized taking.

Under the Act, the Secretary of Commerce is responsible for cetaceans and for pinnipeds, except walruses. Permitting, enforcement, research, and regulatory responsibilities regarding these groups have been delegated by the Secretary to the National Marine Fisheries Service, part of the Department of Commerce's National Oceanic and Atmospheric Administration. The Service in turn has vested much of this responsibility in its Office of Protected Resources.

Both lethal and non-lethal taking may be authorized under the incidental take provisions of the Act, provided there is sufficient basis for concluding that the taking will have negligible population-level effects. Authorization of possible incidental lethal taking or serious injury requires promulgation of regula-

tions setting forth the permissible methods and levels of taking and requirements for monitoring and reporting the taking. Incidental taking by harassment only can be authorized by a simplified notice and comment procedure, similar to the procedure used to issue permits authorizing taking for scientific research and public display. Promulgation of regulations authorizing possible lethal taking or serious injury can take 240 days or more. Incidental harassment authority can be obtained in as few as 45 days. In both cases the individual or organization seeking the taking authorization must submit a written request to the National Marine Fisheries Service. The request must describe the activity for which the small take authorization is being requested, indicate how and how many marine mammals are expected to be taken incidental to the activity, explain the rationale for concluding that the taking will have negligible population-level effects, and indicate the monitoring program proposed to be undertaken to insure that marine mammals are taken only in the ways and numbers authorized.

The Service must publish public notice of both receipt and its proposed response to requests for small take authorizations, and provide at least 30 days for comment before issuing the requested authorization. If there is uncertainty concerning the possible impacts of the requested taking authorization, the Service may undertake or require that the applicant undertake an environmental assessment or environmental impact statement in accordance with the National Environmental Policy Act.

#### THE ENDANGERED SPECIES ACT

This Act provides for the listing of species of flora and fauna that require special protection because they are in danger of extinction, or likely to become so in the foreseeable future, as a consequence of natural factors or human activities. It prohibits activities that are likely to jeopardize the continued existence of listed species or result in the degradation or destruction of habitat critical to their survival. It provides that permits may be issued to authorize the taking of listed species for purposes of scientific research or to enhance their recovery. It requires that Federal agencies contemplating permitting, funding, or conducting an activity that could adversely affect a listed species or its habitat undertake consultations with the agency with related ESA regulatory responsibilities - either the National Marine Fisheries Service or the Fish and Wildlife Service - to insure that the activity will not jeopardize the survival of the species or adversely affect its critical habitat. Preparation of a biological opinion is required if the consultations indicate that the contemplated activity could result in jeopardy or destruction or degradation of habitat critical to the survival of a listed species. The purpose of the biological opinion is to assess available information concerning the nature and significance of possible adverse effects and to identify reasonable and prudent alternatives if the assessment indicates that the contemplated activity, by itself or in conjunction with other activities, is likely to jeopardize the survival or critical habitat of a listed species. Preparation of an environmental assessment or impact statement in accordance with the provisions of the National Environmental Policy Act also may be required.

Antarctic species listed as endangered or threatened under the U.S. Endangered Species Act include the Blue, Fin, Sei, Humpback, Right, and Sperm Whales. The National Marine Fisheries Service is responsible under the Endangered Species Act as well as the Marine Mammal Protection Act for assessing the possible impacts of scientific research and other activities on these species, and for issuing taking authorizations and insuring that authorized activities do not jeopardize their survival or critical habitats.

## SUMMARY

In summary, U.S. law requires that environmental impact assessments be done as part of the decision-making process for any scientific research or other government or non-governmental activities in the Antarctic Treaty Area that could have adverse environmental impacts. In addition, U.S. law requires that authorization for taking of, and harmful interference with, native species of flora and fauna be obtained from the National Science Foundation. In addition, U.S. law requires that authorization to take cetaceans and pinnipeds for purposes of scientific research or incidental to other activities be obtained from the National Marine Fisheries Service as well. U.S. law also requires that authorized taking be monitored to insure that animals are taken only in the ways and numbers authorized.

## APPENDIX

### UNITED STATES LAWS AND REGULATIONS APPLICABLE TO ACTIVITIES OF U.S. CITIZENS AND GOVERNMENTAL AND NON-GOVERNMENTAL ORGANIZATIONS IN ANTARCTICA

#### THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

##### *Purpose*

- To insure that the possible environmental impacts of Federal Government activities are identified and taken into account early in the decision-making process.

##### *Application and requirements*

- Applies to all major, discretionary government activities.
- Requires that impact assessments be conducted and that alternatives be identified and considered if significant environmental impacts are a possibility

Purposes and requirements are functionally equivalent to those set out in Article 8 and Annex 1 of the Protocol on Environmental Protection to the Antarctic Treaty.

#### THE ANTARCTIC SCIENCE, TOURISM, AND CONSERVATION ACT OF 1996

- Implements the provisions of the Protocol on Environmental Protection to the Antarctic Treaty;

- Applies to all U.S. government and non-governmental activities in the Antarctic Treaty Area;
- Prohibits the taking of, or harmful interference with, any species of bird, mammal, or plant native to the Treaty Area, except in accordance with a permit issued by the appropriate national authority;
- Provides that permits may be issued only for collection of specimens for scientific research or education, and taking or harmful interference incidental to construction and operation of scientific support facilities;
- Assigns responsibility to the National Science Foundation for issuing and insuring compliance with permits authorizing the taking of and harmful interference with native flora and fauna.
- The National Science Foundation also is responsible under the ASTCA for assessing the possible environmental impacts of U.S. scientific research and related support operations in the Treaty Area, and for insuring that any environmental impacts are minimized and consistent with the provisions of the Environmental Protocol and applicable U.S. laws and regulations.
- To meet this responsibility, the Program Managers in the Foundation's Office of Polar Programs routinely review proposals for scientific research and related support operations to determine the nature and likelihood of possible environmental impacts.
- If this initial evaluation indicates that the activity is likely to have little or no environmental impact, the activity may proceed with no further environmental evaluation. If it indicates that the activity could have a significant (more than minor or transitory) environmental impact, a formal environmental assessment is done in accordance with the provisions of the National Environmental Policy Act. An environmental assessment is a written document, equivalent to an Initial Environmental Evaluation (IEE) required by the provisions of Annex 1 of the Environmental Protocol.
- If the environmental assessment results in a finding of no significant impact (a FONSI) - equivalent to a finding of a minor or transitory environmental impact under the Environmental Protocol -, the proposed action may proceed without further environmental evaluation.
- If either the initial environmental evaluation or the environmental assessment indicates that the activity in question is likely to have a significant environmental impact, an environmental impact statement (EIS) must be done. This is equivalent to a comprehensive environmental evaluation (CEE) required by the Environmental Protocol.
- Among other things, an EIS must identify and consider the environmental impacts of possible alternatives to the proposed action, including the advantages and disadvantages of the no-action alternative. A draft of the document must be made available to the public and to the Antarctic Treaty Parties for comment, and comments must be summarized and addressed in the final document.
- Following completion of the EIS, the Foundation must prepare and make public a record of decision indicating the alternatives that were considered and the basis for its decision to proceed or not to proceed with the proposed action or an alternative.

### Exceptions

- If an environmental assessment or impact statement was done previously for a comparable action in the same or a similar area, an abbreviated assessment can be done, incorporating the earlier assessment by reference. Alternatively, the responsible agency may establish a categorical exclusion for classes of actions that it has determined unlikely to have significant environmental impacts.
- If a categorical exclusion applies to a proposed action, an environmental assessment or impact statement need not be prepared unless exceptional circumstances apply - e.g., there is a scientific controversy or the proposed action is novel or precedent-setting.

### THE MARINE MAMMAL PROTECTION ACT OF 1972

- Established a moratorium on the taking of marine mammals in U.S. waters and by U.S. citizens on the high seas.
- Provides that permits may be issued authorizing the taking of marine mammals for purposes of scientific research, public display, and enhancement of depleted stocks.
- Also provides that taking of small numbers of marine mammals incidental to offshore oil and gas development, oceanographic research, and other activities may be authorized if the taking will have negligible population-level effects and the responsible regulatory agency promulgates regulations or otherwise specifies how and how many marine mammals may be taken, and sets forth requirements for monitoring and reporting the taking.
- The National Marine Fisheries Service is responsible for issuing and insuring compliance with permits for scientific research and 44 "small-take" authorizations involving cetaceans and pinnipeds, except walruses.
- Both lethal and non-lethal taking may be authorized under the incidental take provisions of the Act, provided there is sufficient basis for concluding that the taking will have negligible population-level effects.
- The NNWS must publish receipt of applications for both scientific research permits and small take authorizations, and provide at least 30 days for public comment before issuing the requested taking authorization. If there is uncertainty concerning the possible impacts of the requested taking authorization, the Service may undertake or require

that the applicant undertake an environmental assessment or impact statement in accordance with the National Environmental Policy Act.

### THE ENDANGERED SPECIES ACT OF 1973

- Provides for the listing and protection of species of flora and fauna that are in danger of extinction, or likely to become endangered in the foreseeable future, as a consequence of either natural factors or human activities.
- Prohibits activities that are likely to jeopardize the continued existence of listed species or to damage or destroy habitat critical to their survival.
- Provides that permits may be issued to authorize taking for purposes of scientific research or to enhance recovery of listed species.
- Requires that Federal agencies contemplating permitting, funding, or conducting activities that could affect listed species undertake consultations with the responsible regulatory agency to insure that the activity will not jeopardize the survival or adversely affect the habitat of the species.
- Requires that a "biological opinion" be prepared if the consultations indicate that the activity is likely to result in jeopardy or degradation or destruction of habitat critical to the survival of a listed species.
- The purpose of a biological opinion is to assess available information concerning the nature and significance of the impacts of the contemplated action, and to identify reasonable and prudent alternatives if the assessment indicates that the action is likely, by itself or in combination with other activities, to jeopardize the survival or critical habitat of a listed species. Preparation of an environmental assessment or impact statement in accordance with the provisions of the National Environmental Policy Act may also be required.
- Antarctic species listed as endangered under the ESA include the Blue, Fin, Sei, Humpback, Right, and Sperm Whales.
- The National Marine Fisheries Service is responsible under the Endangered Species Act, as well as the Marine Mammal Protection Act, for assessing the possible impacts of scientific research and other activities on these species, and for issuing taking authorizations and insuring that authorized activities do not jeopardize their survival or critical habitat.